Petition

81-1304

No. ——

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

MATTHEW S. PERLMAN
Counsel of Record
RICHARD J. WEBBER

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6279

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED

In 1976 the United States Court of Appeals for the District of Columbia Circuit held that in recommending changes in the Nation's postal rates, the Postal Rate Commission must base those rates on cost-of-service principles to the maximum extent reasonably possible. *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977). In ratemaking proceedings culminating in a recommended decision dated February 19, 1981, the Commission purported to follow the directives of the D.C. Circuit. Its decision, as adopted by the Governors of the United States Postal Service, was vacated on review by the Second Circuit on November 2, 1981 primarily because maximum usage of cost-of-service principles was held to be an improper ratemaking objective. The questions presented are:

1. Whether the requirement of section 3622(b)(3) of the Postal Reorganization Act that each mail class "bear the direct and indirect postal costs attributable to the class . . . plus that portion of all other costs . . . reasonably assigned to such class" requires usage of cost-of-service principles to the maximum extent reasonably possible?

2. Whether the Postal Rate Commission's allocation of costs based upon a hypothetical "service-related costs" methodology, combined with the Commission's failure to utilize other accounting formulae, was arbitrary, capricious, illegally discriminatory against first-class mail, and inconsistent with statutory requirements?

PARTIES TO PROCEEDING BELOW

In addition to the United States Postal Service and the National Association of Greeting Card Publishers, the following were parties in the Second Circuit proceeding to which this petition for certiorari is directed:

Newsweek, Inc.

Time, Inc.

International Labor Press Association

Warshawsky and Company

Classroom Publishers Association

March of Dimes

American Business Press, Inc.

Association of American Publishers, Inc.

The Recording Industry of America, Inc.

Magazine Publishers Association, Inc.

Mail Order Association of America

Parcel Shippers Association

Reader's Digest Association, Inc.

Dow Jones & Company, Inc.

Direct Mail/Marketing Association, Inc.

Council of Public Utility Mailers

United Parcel Service of America, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING BELOW ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

1. The Postal Reorganization Act of 1970 3
2. Commission Docket R80-1 6
3. The Governor's Decision 7
4. The Second Circuit's Opinion 7

REASONS FOR GRANTING THE WRIT 9

1. The Decision Below Conflicts With The Decisions Of The D.C. Circuit As To The Proper Interpretation Of 39 U.S.C. § 3622(b)(3) 9
2. The Decision Below Raises Significant And Recurring Problems For Future Ratemaking Proceedings 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES: Page

Davidson v. *Gardner*, 370 F.2d 803 (6th Cir. 1966).... 9

Newsweek, Inc. v. *United States Postal Service*, Nos. 81-4035, *et al.* (2d Cir. Nov. 2, 1981) 1, 8, 9, 12

National Association of Greeting Card Publishers v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ..... i, 6, 10, 11

National Association of Greeting Card Publishers v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 6

Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) 9

STATUTES:

5 U.S.C. § 706 4

28 U.S.C. § 1254(1) 2

39 U.S.C. § 101 *et seq.* 2

39 U.S.C. § 201 3

39 U.S.C. § 202 3

39 U.S.C. §§ 3601, 3602 3

39 U.S.C. § 3622 8

39 U.S.C. § 3622(a) 3

39 U.S.C. § 3622(b) 5, 11, 12, 13

39 U.S.C. § 3622(b)(3) 6, 8, 10, 12, 13

39 U.S.C. § 3622(c) 9

39 U.S.C. § 3624 6

39 U.S.C. § 3624(a) 3

39 U.S.C. § 3624(c) 3

39 U.S.C. § 3625 4

39 U.S.C. § 3625(c) 7

39 U.S.C. § 3628 ..... 4, 7

OTHER:

Davis, *Administrative Law*, § 3A.2 (Supp. 1976) 9

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, National Association of Greeting Card Publishers ("NAGCP"), prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in *Newsweek, Inc.* v. *United States Postal Service,* Nos. 81-4035, *et al.,* on November 2, 1981, (App. A, *infra*).

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The Decision of

the Governors of the United States Postal Service, dated March 10, 1981, allowing under protest the February 19, 1981 Opinion and Recommended Decision of the Postal Rate Commission, appears in Appendix B hereto.[1]

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 2, 1981. A petition for rehearing was denied on January 11, 1982. This petition for certiorari was filed within 90 days of the latter date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Appendix C contains the relevant statutory provisions of the Postal Reorganization Act of 1970 (Pub. L. No. 91-375, 84 Stat. 719 *et seq.*).

STATEMENT OF THE CASE

This case involves the principles and methodology by which the Nation's postage rates are to be determined. At issue is the proper interpretation of subsection 3622(b)(3) of the Postal Reorganization Act of 1970 ("Act"), 39 U.S.C. § 101 *et seq.* As a result of the Second Circuit's decision below, there is a direct and irreconcilable conflict between that circuit and the D.C. Circuit with regard to the meaning of subsection 3622(b)(3). This conflict precludes meaningful ratemaking in future cases.

---

[1] The February 19, 1981 Opinion of the Postal Rate Commission, with Appendices, is more than 1,000 pages in length. That Opinion is in the Record certified to the Court of Appeals.

1. The Postal Reorganization Act of 1970

The statutory framework for the formulation of postage rates is found in the Postal Reorganization Act of 1970. The Act established the United States Postal Service ("Postal Service") as an independent agency of the executive branch [2] and created a Board of Governors to manage the agency.[3] The Act also established the Postal Rate Commission ("Commission") which functions independently of the Postal Service.[4] Together, the Governors of the Postal Service and the Commission are responsible, in accordance with the Act's provisions, for determination of postage rates and classifications.

The statutory process begins with the submission by the Postal Service to the Commission of a request for a recommended decision on changes in postal rates and fees.[5] On receipt of such a request, the Commission holds hearings, on the record, in which the Postal Service and interested users of the mails appear and present evidence.[6] Within 10 months of receiving the Postal Service's request, the Commission must issue its recommended decision.[7] The Governors then act on

---

[2] 39 U.S.C. § 201.

[3] The Board of Governors consists of 11 members, nine of whom are known as Governors and are appointed by the President for nine-year terms. The Governors appoint the Postmaster General and the Deputy Postmaster General who become voting members of the Board. 39 U.S.C. § 202.

[4] The Commission is composed of five Commissioners appointed by the President for six-year terms. 39 U.S.C. §§ 3601, 3602.

[5] 39 U.S.C. § 3622(a).

[6] 39 U.S.C. § 3624(a).

[7] 39 U.S.C. § 3624(c).

the decision in one of several specified manners: approval, allowance under protest, rejection, or modification.[8] A decision of the Governors to approve, allow under protest, or modify the Commission's recommended rates is appealable to any United States Court of Appeals, which reviews the decision on the basis of the record before the Commission and Governors under the standards of 5 U.S.C. § 706.[9]

Of particular importance is section 3622(b) of the Act. That section provides the criteria by which the Commission is to formulate postal rates:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) *the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;*
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy en-

[8] 39 U.S.C. § 3625.

[9] 39 U.S.C. § 3628.

gaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matters at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.[10]

The proper interpretation of paragraph (b)(3), emphasized above, has been the subject of litigation since the first rate proceeding under the Act. That paragraph requires that "each class of mail . . . bear the direct and indirect postal costs attributable to that class . . . plus that portion of all other costs of the Postal Service reasonably assignable to such class." Though it is agreed by all that (b)(3) requires "attribution" of costs on a cost-of-service basis,[11] there has been disagreement about the extent to which casual relationships must be sought out and applied in the

---

[10] 39 U.S.C. § 3622(b) (emphasis supplied).

[11] Allocation on a cost-of-service basis denotes that the costs caused by the particular class of mail are allocated, for pricing purposes, to that class.

ratemaking process to satisfy that provision. There has been, in addition, disagreement as to whether the "reasonabl[e] assign[ment]" of costs under (b)(3) can be based on non-cost-of-service criteria.

These disagreements were resolved in the United States Court of Appeals for the District of Columbia Circuit in *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ("NAGCP I"). The court held that subsection 3622(b)(3) required maximum allocation of costs, both by "attribution" and "reasonable assignment," based on cost-of-service principles. The Commission has purported to follow that decision in proceedings thereafter, although its application of these principles will be at issue in this appeal.

2. Commission Docket R80-1

On April 21, 1980, the Postal Service submitted to the Commission a request for a recommended decision on changed postal rates. The Commission held hearings on the request in Commission Docket R80-1, the fifth general rate proceedings under the Act. Numerous parties, including NAGCP, appeared and presented evidence. On February 19, 1981, the Commission transmitted a lengthy Opinion and Recommended Decision to the Governors, in accordance with 39 U.S.C. § 3624. Citing NAGCP I,[12] the Commission allocated 73.6 percent of total costs on what it deemed to be cost-

[12] The Commission also relied on a subsequent decision in the D.C. Circuit, namely, *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) ("NAGCP III").

of-service principles, including a "service-related cost" concept. The Commission also reduced the Postal Service's proposed revenue requirement by approximately $1 billion as part of its recommended rate package.

3. The Governor's Decision

Pursuant to 39 U.S.C. § 3625(c), the Governors, by decision dated March 10, 1981, effective March 22, allowed (with certain exceptions) the Commission's recommended rates to take effect under protest and returned the matter to the Commission for reconsideration. *See* Appendix B hereto. The new rates included an increase in the price of a first-class stamp from 15 to 18 cents. The Governors disagreed with the Commission on several aspects of the recommended decision. Most importantly, the Governors urged that the Commission's $1 billion reduction in revenue requirement was irresponsible and that the service-related cost concept was "patently unrealistic." The Governors also expressed their disagreement with the conclusions of the *NAGCP I* decision.

4. The Second Circuit's Opinion

Several parties petitioned for review of the Governors' March 10, 1981 decision in the Second Circuit and D.C. Circuit.[13] The petitions were consolidated in the Second Circuit, and the case was briefed and argued to a panel of the court.[14] On November 2, 1981,

---

[13] Jurisdiction in these courts was based on 39 U.S.C. § 3628.

[14] Meanwhile, the Commission issued its Recommended Decision Upon Reconsideration on June 4, 1981. The Governors "rejected"

the Second Circuit issued its opinion remanding the matter for further consideration in the light of that opinion. *Newsweek, Inc.* v. *United States Postal Service,* Nos. 81-4035, *et al.* (2d Cir. Nov. 2, 1981). *See* Appendix A, *infra.*

The central issue addressed by the Second Circuit was the proper interpretation of section 3622(b)(3) of the Act. Certain parties, including the Postal Service, argued that the D.C. Circuit's interpretation of that provision in *NAGCP I* was incorrect. The Second Circuit agreed.

The language of section 3622 was not to be interpreted, said the court, as requiring maximum cost-of-service allocation; rather, the attribution requirement was intended only to provide a "rate floor" for each class based on short-term variable costs, while the phrase "that portion of all other costs . . . reasonably assignable to such class" was found not to imply the use of cost-of-service principles at all.[15]

---

that further recommended decision on June 29, 1981, and again remanded the matter to the Commission. The Commission's Recommended Decision Upon Further Reconsideration, issued September 17, 1981, was "modified" by the Governors on September 30, 1981. The modification resulted, *inter alia,* in the increase in the price of a first-class stamp from 18 to 20 cents. The Governors' September 30, 1981 decision has been appealed and is currently the subject of proceedings in the Second Circuit (Docket Nos. 81-4183, *et al.*).

[15] The court relied heavily for its conclusions on the following language erroneously attributed to the Report of the Conference Committee:

> The provision in the conference substitute with respect to costs attributable to a class of mail or type or service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular

Several parties also argued that the Commission's reliance on a service-related cost concept was arbitrary and capricious. The Second Circuit, however, upheld the concept, stating that it was "not an unreasonable methodology."

Other issues addressed by the court include the Postal Service's revenue requirement, which, the court held, had been arbitrarily reduced by the Commission, and the Governors' modification of certain of the Commission's recommended rates, which the court found to be proper as part of the Governors' allowance under protest of the majority of rates under 39 U.S.C. § 3622(c).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Decision Below Conflicts With The Decisions Of The D.C. Circuit As To The Proper Interpretation Of 39 U.S.C. § 3622(b)(3)

The Second Circuit's decision is in direct conflict with the decisions of the D.C. Circuit in *NAGCP I* and *NAGCP III* as to the proper interpretation of

---

class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.

Newsweek, Inc., supra (App. A at 24a-26a). The above language was not part of the Conference Report before the Senate when the Senate voted on the Act. Rather, the language is found in the "Statement of the Managers on the Part of the House," a unilateral, after-the-fact House version of the bill's meaning. Such one-sided statements are generally held to be unreliable indications of legislative intent. *See, e.g., Davidson* v. *Gardner*, 370 F.2d 803, 818 (6th Cir. 1966); *Soucie* v. *David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971); Davis, *Administrative Law*, § 3A.2 (Supp. 1976).

39 U.S.C. § 3622(b)(3). This conflict is of enormous significance in postal ratemaking.

In *NAGCP I*, the Court was reviewing the Commission's second ratemaking decision under the Act. Therein the Commission had attributed 52.5 percent of total postal costs to the various mail classes on a cost-of-service basis. The single method used to identify causation was volume variability analysis—that is, the analysis of changes in costs as a function of changes in mail volume.[16] The remaining 47.5 percent of postal costs were judgmentally assigned based on a demand elasticity ("what the traffic will bear") concept. 569 F.2d at 580-82.

On review the D.C. Circuit rejected the Commission's cost allocations as being in contravention of section 3622(b)(3) of the Act. 569 F.2d at 592. Relying on the language of the statute and the legislative history, the court held that section 3622(b)(3) requires allocation of costs based on cost-of-service principles to the maximum extent reasonably possible. 569 F.2d at 593. Specifically, the court held that the Commission could not limit attribution to volume variable costs, but rather must supplement that analysis with allocation formulae based on accounting principles. The court also held that costs "reasonably assigned" under paragraph (b)(3) must also be allocated on cost-of-service principles. 569 F.2d 586. When all costs which could be attributed or reasonably assigned based on cost-of-service principles had been so allocated, the Commis-

---

[16] The Commission did attribute a very small amount of costs designated as "specific fixed costs," costs which the Commission could trace to a single class of service without regard to volume. The amount of costs so allocated was, however, *de minimis*. *See* 569 F.2d at 581 n.32.

sion was to distribute the remaining costs in accordance with the non-cost factors of section 3622(b). 569 F.2d at 587.

In support of its conclusions, the court noted that an important motivation for the 1970 legislation was to end the long history of discrimination against first-class mail. This discrimination had taken the form of subsidizing other classes of mail through high first-class rates.[17] Congress realized, said the court, that such discrimination was best prevented by assuring that each class bore all of the costs that could reasonably be inferred to have been caused by providing the service. 569 F.2d at 587-89.[18]

---

[17] For example, the court noted the following statement from the legislative history:

> Most of the money in the postal system comes from first class mail. A 100% increase in the rate for all second class mail would not produce as much revenue as a 5% increase in the first class rate. The temptation to resolve the financial problems of the post office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing the imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

569 F.2d at 588 n.65 (quoting S. Rep. No. 91-912, 91st Cong., 2d Sess. 13 (1970)).

[18] The court stated:

> We are persuaded that the conference committee amendments, which apparently were insisted upon by the Senate conferees in exchange for the major concession of retaining certain preferential classes of mail, were intended to clarify the extreme degree to which the Act restricts that prior, and quite problemful, discretion. In view of this it would be anomalous to construe subsection 3622(b)(3) as permitting a grudging use of cost-of-service principles which, by expanding the residuum of costs subject to discretionary allocation, simply preserves the potential for continuing the very same discriminatory treatment that the act so clearly intended to remedy.

569 F.2d at 589.

The Second Circuit concluded that the "D.C. Circuit's interpretation of 39 U.S.C. § 3622(b) has placed unwarranted and unintended restraints upon the discretionary authority of the [Commission] and Board." It criticized the D.C. Circuit for "fail[ing] to give sufficient deference to the agency's own interpretation of the statute, misread[ing] the plain language of section 3622(b) and misconstru[ing] the legislative history." It left no room for doubt that its views and those of the D.C. Circuit cannot be reconciled:

> From our "plain reading" of the statute and review of its legislative history we conclude that the D.C. Circuit erred in *NAGCP I* and *III* in holding that section 3622(b) requires the PRC to attribute and assign costs to the maximum extent possible using cost-of-service principles.

Newsweek, Inc., supra (App. A at 26a).

NAGCP contends that the D.C. Circuit is correct; NAGCP will ask this Court to apply the principles there enunciated to the decision of the Commission and Governors.

2. The Decision Below Raises Significant And Recurring Problems For Future Ratemaking Proceedings

The Second Circuit's decision places the Commission, the Postal Service, and the Nation's mailers in an intolerable position. There are now two diametrically opposed interpretations of section 3622(b)(3), each with an equal claim for obedience by all parties.

General ratemaking proceedings, such as the one reviewed by the Second Circuit below, are commenced periodically when the Postal Service needs additional

revenue.[19] Any such proceeding is primarily concerned with the source of the additional revenues as among the classes of mail. The rates for each class depend in turn on the allocation of costs pursuant to section 3622(b)(3).

Meaningful proceedings before the Commission are impossible under the current state of the law. If the Commission were to limit its cost-of-service allocations to minimal attribution, consistent with the Second Circuit's interpretation of section 3622(b)(3), then the race to the courthouse would determine whether that decision was affirmed or vacated, for the D.C. Circuit would clearly vacate and remand.[20] The Commission could, alternatively, resolve to maximize cost-of-service allocations and thereby hope to avoid reversal in either circuit. In that instance, however, the Commission could not expressly rely, in its opinion, on the D.C. Circuit decisions, lest the Second Circuit on review hold that the Commission's result was tainted by an improper statutory interpretation. The public interest will not be served by a Commission whose determinations on the merits may be influenced by the extraneous consideration of how best to please the competing demands of two circuits.

The parties to the ratemaking proceedings are in an equally untenable position. Those such as NAGCP that favor the D.C. Circuit's interpretation, will urge the Commission to maximize cost-of-service allocations; others will do the opposite. No party, however,

---

[19] There have been five general ratemaking proceedings in the past eleven years.

[20] The D.C. Circuit determined in *NAGCP I* that attribution of only 52.5 percent of total postal costs was unacceptable.

can argue persuasively with the knowledge that the validity of its arguments depends upon the review forum.

In sum, the conflict between the Second Circuit and D.C. Circuit must be resolved by this Court before postal ratemaking, which involves more than $20 billion annually and impacts virtually every citizen and business in the Nation, can resume.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

MATTHEW S. PERLMAN
Counsel of Record
RICHARD J. WEBBER

ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6279

Counsel for Petitioner

Appendix

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS,
CLERK

81-1304

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MATTHEW S. PERLMAN
RICHARD J. WEBBER
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for the National Association of Greeting Card Publishers

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

APPENDIX A—Opinion of the United States Court of Appeals for the Second Circuit, No. 81-4035, *et seq.*, November 2, 1981 ..... A

APPENDIX B—Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services, March 10, 1981 ..... B

APPENDIX C—The Postal Reorganization Act, as amended, 39 U.S.C.

§ 101 C

§ 201 C

§ 401 C

§ 403 C

§§ 3601-3628 C

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, No. 81-4035, *et seq.*, November 2, 1981

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1567, 1568, 1569, 1570—September Term, 1980

(Argued: August 13, 1981 Decided: November 2, 1981)

Docket Nos. 81-4035, 81-4037, 81-4047, 81-4075

NEWSWEEK, INC., TIME INCORPORATED, MAGAZINE PUBLISHERS ASSOCIATION, INC., COUNCIL OF PUBLIC UTILITY MAILERS, READER'S DIGEST ASSOCIATION, INC., and UNITED PARCEL SERVICE OF AMERICA, INC.,

Petitioners,

—against—

UNITED STATES POSTAL SERVICE,

Respondent,

WARSHAWSKY & COMPANY, AMERICAN BUSINESS PRESS, INC., DOW JONES & COMPANY, INC., INTERNATIONAL LABOR PRESS ASSOCIATION, AFL-CIO/CLC, PARCEL SHIPPERS ASSOCIATION, DIRECT MAIL/MARKETING ASSOCIATION, INC., MARCH OF DIMES, MAIL ORDER ASSOCIATION OF AMERICA, ASSOCIATION OF AMERICAN PUBLISHERS, INC., RECORDING INDUSTRY ASSOC. OF AMERICA, INC., NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, MAGAZINE PUBLISHERS ASSOCIATION, INC., CLASSROOM PUBLISHERS ASSOCIATION, AMERICAN LUNG ASSOCIATION, NATIONAL EASTER SEAL SOCIETY, ST. JUDE CHILDREN'S RESEARCH HOSPITAL, AMERICAN CANCER SOCIETY, and NATIONAL WILDLIFE FEDERATION

Intervenors.

COUNCIL OF PUBLIC UTILITY MAILERS,

Petitioners,

—against—

UNITED STATES POSTAL SERVICE,

Respondent,

NEWSWEEK, INC., DOW JONES & COMPANY, INC., TIME INCORPORATED, ASSOCIATION OF AMERICAN PUBLISHERS, INC., RECORDING INDUSTRY ASSOC. OF AMERICA, INC., PARCEL SHIPPERS ASSOCIATION, READER'S DIGEST ASSOCIATION, INC., MAIL ORDER ASSOCIATION OF AMERICA, UNITED PARCEL SERVICE OF AMERICA, INC., NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, INTERNATIONAL LABOR PRESS ASSOCIATION, AFL-CIO/CLC, DIRECT MAIL/MARKETING ASSOCIATION, INC., WARSHAWSKY & COMPANY, MAGAZINE PUBLISHERS ASSOCIATION, INC., CLASSROOM PUBLISHERS ASSOCIATION, AMERICAN BUSINESS PRESS, INC., AMERICAN LUNG ASSOCIATION, NATIONAL EASTER SEAL SOCIETY, ST. JUDE CHILDREN'S RESEARCH HOSPITAL, AMERICAN CANCER SOCIETY, NATIONAL WILDLIFE FEDERATION,

Intervenors.

Before:

MESKILL and KEARSE, *Circuit Judges,*
and COFFRIN, *District Judge.**

Appeal from an order of the Board of Governors of the United States Postal Service, which ordered into effect, under protest, and returned to the Postal Rate Commission for

* Honorable Albert W. Coffrin, United States District Judge for the District of Vermont, sitting by designation.

further consideration certain changes in postal rates in accordance with The Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.* (1976).

Remanded.

JOHN M. BURZIO, Hydeman, Mason, Burzio & Lloyd, Washington, D.C.,
for Petitioners/Intervenors Newsweek, Inc., Time Incorporated and Magazine Publishers Association, Inc.

(Diana M. Daniels, New York, New York, Toni K. Allen, Jay A. Resnick, Wald, Harkrader & Ross, Washington, D.C., of counsel),
for Petitioner/Intervenor Newsweek, Inc.

(Charles M. Waygood, Olwine, Connelly, Chase, O'Donnell & Weyher, New York, New York, Justin R. Wolf, Louise C. Powell, Washington, D.C., of counsel),
for Petitioner/Intervenor Time Incorporated.

(John M. Hadlock, Whitman & Ransom, New York, New York, David Minton, Loomis, Owen, Fellman & Howe, Washington, D.C., of counsel),
for Petitioner/Intervenor Magazine Publishers Association, Inc.

ROBERT L. KENDALL, JR., Philadelphia, Pennsylvania (Irving R. Segal, John E. McKeever, Schnader, Harrison, Segal & Lewis, Philadelphia, Pennsylvania, of counsel),
for Petitioner/Intervenor United Parcel Service of America, Inc.

RICHARD J. WEBBER, Washington, D.C. (Matthew S. Perlman, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., John T. Kerrigan, Howie & Robertson, New York, New York, of counsel),

for Intervenor National Association of Greeting Card Publishers.

TIMOTHY J. MAY, Patton, Boggs & Blow, Washington, D.C.,
for Petitioner Council of Public Utility Mailers, Petitioner/Intervenor Reader's Digest Association, Inc. and Intervenors Mail Order Association of America and Parcel Shippers Association.

(Peter V.K. Funk, Jr., Gould & Wilkie, New York, New York, Eugene E. Threadgill, Connole and O'Connell, Washington, D.C., of counsel),
for Petitioner Council of Public Utility Mailers.

(David C. Todd, Patton, Boggs & Blow, Washington, D.C., of counsel),
for Intervenor Mail Order Association of America.

WILLIAM J. OLSON, Smiley, Murphy, Olson & Gilman, Washington, D.C. (Alan R. Swendiman, Jackson, Campbell, & Parkinson, Washington, D.C., of counsel),
for Intervenors March of Dimes, American Lung Association, National Easter Seal Society, St. Jude Children's Research Hospital, American Cancer Society and National Wildlife Federation.

DANA T. ACKERLY, Washington, D.C. (David K. Flynn, Covington & Burling, Washington, D.C., of counsel),
for Intervenor Direct Mail/Marketing Association, Inc.

RAYMOND N. SHIBLEY, Washington, D.C. (M. Reamy Ancarrow, LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C., W. Gilbert Faulk,

Jr., Dow Jones & Company, Inc., Princeton, New Jersey, of counsel),
for Intervenor Dow Jones & Company, Inc.

(Charles Emmet Lucey, Gary L. Ryan, McDermott, Will & Emery, Washington, D.C., of counsel),
for Intervenors Warshawsky & Company and International Labor Press Association, AFL-CIO/CLC.

FRANCES G. BECK, Assistant General Counsel, United States Postal Service (Louis A. Cox, General Counsel, Susan M. Duchek, Daniel J. Foucheaux, Jr., Eric P. Koetting, Gerald J. Robinson, United States Postal Service, Washington, D.C., of counsel),
for Respondent, United States Postal Service.

MESKILL, *Circuit Judge:*

These consolidated cases arise from an order of the Board of Governors of the United States Postal Service which allowed, under protest, certain changes in postal rates and fees to take effect pursuant to the rate-making provisions of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.* (1976) ("Act").

Collectively, the petitioners and intervenors in this case attack the order of the Postal Board of Governors on a broad front. The principal issue presented for review is whether the resulting changes in rates and fees are lawful. To that end, two major challenges are presented. Several parties argue that the rates are unlawful because they are based upon an incorrect interpretation of 39 U.S.C. § 3622(b) that was foisted upon the postal system by the United States

Court of Appeals for the District of Columbia Circuit.[1] Other parties contend that the D.C. Circuit's interpretation is correct, but argue that the Service-Related Cost ("SRC") concept, which was used to allocate various costs in setting the current rates, is irrational and that the rates are accordingly unlawful. The respondent Postal Service, while it defends its decision to allow the changes to take effect under protest as legal and proper, also aligns itself with the petitioners to the extent that it contests the D.C. Circuit's interpretation of section 3622(b) and rejects the SRC concept. These issues are treated first in this opinion.

An additional issue of primary importance raised on this appeal concerns the Postal Service's general revenue requirements. This issue is reviewed second. Finally, a plethora of issues concerning much narrower disputes is reviewed.

An appropriate resolution of the esoteric issues presented in this case requires a general understanding of the postal system's organization and rate-making structure which will therefore be discussed first.

The Postal Service

The postal system is comprised of two independent executive agencies, the United States Postal Service, *see* 39 U.S.C. § 201, which is governed by a Board of Governors ("Board"), *see* 39 U.S.C. § 202, and a Postal Rate Commission ("PRC"), *see* 39 U.S.C. § 3601.

The issues in this case arise from a rate-making proceeding, yet also touch upon certain tensions that exist within the structure of the postal system, specifically between the Board and the PRC.

The rate-making process in the postal system is unique. While the Board is entrusted with the power "to establish

---

[1] *See National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977).

. . . reasonable and equitable rates of postage and fees for postal services," *see* 39 U.S.C. § 3621, its actual rate-making authority, with a few exceptions, is limited to approving, rejecting, modifying, or allowing under protest recommendations of the PRC, *see* 39 U.S.C. § 3625(a). The PRC, however, may not initiate a rate proceeding on its own. Rather, pursuant to section 3622(a), the PRC must await a "request" from the Board

> to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service [Board] determines that such changes would be in the public interest and in accordance with the policies [of the Act].[2]

Section 3622(b) provides that upon receiving such a request from the Board, the PRC "shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and [certain] factors." For convenience, the individual factors are omitted at this point, but will be discussed in detail below.

Once the PRC responds with its recommended decision, the Board has several options. Section 3625(a) provides that "the Governors may approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section."

As a prerequisite to modification, the Board must first reject the PRC's recommended decision and "resubmit" it to the PRC for further consideration. 39 U.S.C. § 3625(d). Then, upon receiving the PRC's decision following reconsid-

---

[2] Section 3622(a) provides:

> From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

eration, the Board, only if it is unanimous, may modify the decision. *Id.*

Finally, if pursuant to section 3625(c) the Board "under protest, allow[s] a recommended decision to take effect," it must either seek judicial review of the PRC's decision, or return the decision to the PRC for reconsideration and a further recommended decision.

In the case before us, the Board opted for subdivision (c), placing the PRC's recommended decision into effect under protest, and returning the decision to the PRC for further consideration.

The Board's decision to allow under protest and return the decision to the PRC constituted a final order subject to judicial review upon the appeal of an "aggrieved party." 39 U.S.C. § 3628. Section 3628 provides that a decision of the Board may be appealed to any circuit court of appeals in the United States and further provides that the circuit court

> may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. The court shall make the matter a preferred cause and shall expedite judgment in every way. The court may not suspend the effectiveness of the changes, or otherwise prevent them from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a decision made by the Commission or Governors under this chapter except as provided in this section.

Id.

The Case

The chronology of events giving rise to this litigation commenced with the Postal Service, through its Board of Governors, "requesting" a recommended decision on changes in postal rates on April 21, 1980. The Board's action initiated R80-1, the fifth general rate-making proceeding

since the enactment of the Act in 1970. The Postal Service had determined that an annual revenue requirement of $22.9 billion was necessary for the "test year" beginning March 21, 1981 and ending March 20, 1982. The Postal Service had also determined that its proposed rates and fees would increase postal revenues by $3.75 billion annually. The Postal Service requested the PRC to recommend specific changes in hundreds of rates for classes and subclasses of mail and in certain fees. The "request" was accompanied by testimony of eleven witnesses and thousands of documents.[3]

Pursuant to sections 3622(b) and 3624, 39 U.S.C. §§ 3622(b), 3624, the PRC conducted extensive hearings in which more than fifty parties participated. On February 19, 1981, the PRC sent its recommended decision to the Postal Service. The recommendation included a staggering $1 billion reduction in the Postal Service's proposed general revenue requirements and major changes in cost distribution and in the rates compared with those proposed by the Postal Service.

Dissatisfied with the recommendation, the Board returned it to the PRC pursuant to 39 U.S.C. § 3625(c)(2), allowing the decision to take effect under protest. This was the first time that the Board had failed to accept the PRC's initial recommended decision in a rate-making proceeding. The Board stated in its decision that the PRC's decision set rates and revenues so low that the Postal Service might have to borrow funds to meet its obligations. Furthermore, the Board claimed that the decision would require that more frequent rate proceedings be conducted, which would destabilize postal rates. The Board also implied that the PRC lacked authority to scrutinize or adjust general revenue requirements. Nevertheless, the Board allowed the rates to

---

[3] 39 C.F.R. § 3001.54 requires that the "request" contain, among other items, a detailed financial statement and a proposed cost allocation and rate schedule.

go into effect, albeit under protest, "because of the Postal Service's urgent need for revenues."[4]

The subsequent events were summarized by another panel of this Court in *Newsweek, Inc.* v. *United States Postal Service*, 652 F.2d 239 (2d Cir. 1981):

> At 1:35 P.M. on March 10, four minutes after copies of the decision were time-stamped and distributed at Postal Service headquarters, Newsweek filed its petition for review in this Court. Time filed its petition here four minutes later. On March 23, the Council of Public Utility Mailers and UPS filed petitions in the District of Columbia Circuit. Petitions were also filed in that Court by the March of Dimes Birth Defects Foundation on March 27, and by the Readers Digest Association on April 3. Also on March 27 MPA filed its petition in this Court.

Id. at 241.

At issue in that earlier case was whether Newsweek and Time had prematurely filed their petitions, and, even if their filings had been proper, whether their petitions should be transferred to the District of Columbia Circuit in the interest of justice and for the convenience of the parties. The Court concluded

> that Newsweek and Time have properly run—and won—the race to the courthouse. Further, the petitions here filed, together with the four consolidated petitions filed in the D.C. Circuit Court and transferred here on

---

[4] Subsequent to the filing of these appeals, the PRC issued a second recommended decision which substantially reaffirmed its earlier recommendation. *See* PRC Opinion and Recommended Decision Upon Reconsideration (June 4, 1981) (hereinafter "Opinion Upon Reconsideration"). On June 22, 1981, the Board rejected the PRC's second recommendation, but permitted the rates extant to remain in effect. In September 1981, the PRC again refused to alter its original recommended decision. *See* PRC Opinion and Recommended Decision Upon Further Reconsideration (Sept. 17, 1981) (hereinafter "Opinion Upon Further Reconsideration").

the motion of Newsweek by order of that Court on April 28, will remain in this Court to be adjudicated.

Id. at 240-41.

We now turn to the specific concerns raised on this appeal.

39 U.S.C. § 3622(b)

The primary issue raised on this appeal concerns the proper interpretation of 39 U.S.C. § 3622(b) (1976), which provides the procedure which the PRC must follow in setting recommended postal rates. Section 3622(b) provides in its entirety:

> Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
>
> (6) the degree of preparation of mail for delivery

into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

In the first three general rate proceedings under the Act, the PRC and the Board were in agreement as to the meaning of section 3622(b). *See* Docket Nos. R71-1, R74-1, and R76-1. Both read the provision to require a two-step process for allocating postal costs. The first step consisted of determining which costs were directly or indirectly attributable to a specific mail class or service based upon volume variability, and allocating these attributable costs to the specific class or service. Approximately half of the postal system's costs were determined to vary with the volume of mail and were therefore found "attributable" within the meaning of section 3622(b)(3) (as it was then interpreted). The second step was to treat the remaining costs of the postal system as "institutional" and judgmentally "assign" them to the various mail classes and services on the basis of elasticity of demand and, ostensibly, on the basis of the non-cost factors listed in section 3622(b).

In *Association of American Publishers, Inc.* v. *Governors of United States Postal Service*, 485 F.2d 768 (D.C. Cir. 1973), the D.C. Circuit expressed its dissatisfaction with the manner in which the Postal Service had been allocating costs of its operations to the various services it provided, as reflected in the fees for those services, and the various classes and subclasses of mail, as reflected in the postal rates designated for those classes and subclasses. Judge Bazelon's concurring opinion, which was joined by the other two members of the

panel, noted that the PRC's response to section 3622(b)(3), "the requirement that each class of mail . . . bear the direct and indirect postal costs attributable to that class . . . plus that portion of all other costs of the Postal Service reasonably assignable to such class," was "questionable at best," 485 F.2d at 777. The *American Publishers* panel interpreted the language of the subsection to require allocation of costs in accordance with cost-of-service principles to the fullest extent possible. *Id.* at 779. However, in *American Publishers*, the court determined that the Postal Service should be allowed sufficient time in which to formulate a rate-making methodology which would comport with the D.C. Circuit's understanding of the legislative intent underlying the Act.

Then, in *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) (*NAGCP I*), five years after its *American Publishers* decision, the D.C. Circuit decided to take a more active role. The court reaffirmed its earlier interpretation of section 3622, that subsection (b)(3) is the principal factor to be considered by the PRC in setting rates. 569 F.2d at 585. The court noted that of the factors listed only subsection (b)(3) contained the word "requirement." In addition, the court found that the subsection's reference to indirect, direct and "all other costs" of the Postal Service "further emphasize[s] its importance by suggesting a substantial breadth to its coverage." *Id.* Third, the court noted an emphasis throughout the subsection upon cost-of-service principles—that each class bear its "attributable" costs and a portion of all other costs "reasonably assignable" to it. Thus, the court concluded in *NAGCP I* that the plain language of section 3622(b) demanded "that each class of mail and postal service shoulder all the postal costs that may reasonably be traced to the provision of that class or service." *Id.*

The *NAGCP I* Court then declared that the PRC's methodology, which only "attributed" costs to a class of mail or service on the basis of "volume variability" (an accounting

technique), was insufficient. Instead, the D.C. Circuit stated that the PRC should achieve greater attribution of costs through the use of "cost allocation formulae based on accounting principles" to fulfill Congress' intent that "attribution under subsection 3622(b)(3) . . . extend beyond minimally attributable costs and . . . include to a significant extent those additional costs which, although not measurably variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service." *Id.* at 586.

Second, the D.C. Circuit seized upon the term "reasonably assign" contained in subsection 3622(b)(3) and determined

> that the other costs of the Postal Service that are to be "reasonably assigned" must also be allocated on cost-of-service principles. That is, after the process of extended attribution is complete, a portion of remaining costs are to be assigned to the various mail classes and postal services to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs.

Id. at 586. Third, the court noted that some "costs will exist but will not be 'reasonably assignable' to any particular class or type." *Id.* at 587. With respect to this residuum, the D.C. Circuit stated that the "other factors enumerated in section 3622 will govern the allocation of these nonattributable and nonassignable costs." *Id.* Thus, the court displaced the two-tier approach followed by the PRC and Board with three tiers—the attribution and reasonable assignment tiers being based on cost-of-service principles and the final "residual" tier being based on section 3622(b)'s other factors.

With this "guidance," the D.C. Circuit remanded the action to the Postal Service with this *caveat:*

> We wish to emphasize that our holding with regard both to attributable and assignable costs is narrow. Our duty in this case is not to prescribe any one methodology, and nothing we say here should be taken as approving

> in advance any particular approach. The selection of one approach from among acceptable alternatives is a matter for agency expertise. We hold only that in the circumstances of this case neither the Commission's reliance on cost variability as the key to attribution nor its use of demand theory as a premise for allocation of unattributed costs complies with the Act because both plainly contravene in different ways the express statutory command that in setting postal rates every reasonable effort be made to employ cost-of-service principles to the fullest extent possible.

Id. at 592-93 (footnote omitted).[5]

In R77-1, the fourth general rate proceeding under the Act, the PRC acquiesced to the mandate of the D.C. Circuit contained in the *NAGCP I* decision by employing a "Service-Related Cost" ("SRC") concept to "assign" costs pursuant to the second tier of the *NAGCP I* Court's model. The concept was premised upon the assumption that without preferential classes of mail, the Postal Service would only operate on a three-day-a-week as opposed to the normal six-day-a-week schedule. The PRC therefore "assigned" to the preferential classes[6] the additional fixed costs incurred to accommodate them. In introducing the SRC concept, the PRC did express its reservation that:

> We would mislead the reader if we left the impression that we regard *NAGCP I* as unquestionably sound and our previous methods as incompatible with the Act. On the contrary, and with all due respect to the court, we believe that the *NAGCP I* ruling was not inevitably

---

[5] The court had previously noted that "to be acceptable a methodology need only be reasoned, nonarbitrary and permissible under the statute." 569 F.2d at 591.

[6] The preferred mail categories were identified as first class, second class/red tag (including newspapers), and third and fourth class parcels (borderline). *See* PRC Op., R77-1 at 95-96.

> required by the statute and has caused us difficulties in its application. Whether or not it remains the law, however, it is the law today and we are bound to follow it to the best of our ability. This opinion represents, in our view, a comprehensive and workable application of the principles of *NAGCP I*, as we understand them, to the record before us.

PRC Op., R77-1 at 9 (footnote omitted).

The PRC's response to *NAGCP I* and its introduction of the SRC concept were then reviewed by the D.C. Circuit in *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (*NAGCP III*). In *NAGCP III*, the D.C. Circuit first reaffirmed its prior interpretation of section 3622(b) which called for the three-tier cost allocation approach. *Id.* at 400. Then, the court examined the Postal Service's attempt to comply with the court's mandate in *NAGCP I*. The *NAGCP III* Court first paid lip-service to the deference that must be accorded a decision of an agency such as the Postal Service, noting its "obligation to defer to the PRC's expert judgment in the selection of cost allocation methodologies." *Id.* at 401. The court also made the following cryptic remark:

> Our deference is particularly great where the PRC has gone beyond even the "reasonable inferences of causation" that permit "extended attribution" into the zone of "assignment." While both attribution and assignment involve inferences of causation, we observed in *NAGCP II* that "the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former." *Id.*, 186 U.S.App.D.C. at 348 n.59, 569 F.2d at 587 n.59.

Id. at 401. In addition, the court complimented the Postal Service and PRC for their efforts to comply with the directives contained in *NAGCP I*. *Id.* at 404.

Importantly, the PRC in R77-1 did not "attribute" costs

to the extent directed under *NAGCP I*. Rather, the PRC continued to use volume variability as the exclusive factor to determine whether certain costs could be "attributed" within the meaning of section 3622(b)(3). The PRC emphasized that the Postal Service had assembled improved data on long run variable costs that permitted greater "attribution" than had been accomplished in prior rate proceedings, and determined that *NAGCP I*'s call for "extended attribution" had been satisfied. 607 F.2d at 405. The D.C. Circuit was displeased with the PRC's resistance to its previous command in *NAGCP I* that the PRC use cost allocation formulae based on accounting principles as a supplement to the volume variability concept. *Id.* at 405 n.38. But the court never addressed the PRC's failure to adhere strictly to its mandate in *NAGCP I* because "no party . . . challenged the PRC decision on this point," *id.* at 406 & n.40; the court simply stated:

> Taking into account the PRC's expansion of the scope of attributable costs based on variability, its relegation of costs derived from inferences of causation to the assignable category alone may well have been an appropriate application of *NAGCP I*. The context is one in which [the United States Postal Service's] enhanced ability to attribute costs on the basis of volume variability resulted in the attribution, after PRC modification, of almost 65 percent of total costs.

Id. (footnote omitted).

The *NAGCP III* Court also upheld the SRC concept as a proper means to assign costs under section 3622(b). The court rejected arguments that the SRC concept was irrational, finding it "to be reasoned, nonarbitrary, and congruent with the legislature's objective." *Id.* at 404. Nor was the court impressed by the argument that deferral of mail rarely occurs, viewing as sufficient the PRC's contentions that "if all mail were nonpreferential, then three-day delivery would be feasible," and that "deferrability gives rise to

differences between preferential and nonpreferential mail in the overall level of service provided." *Id.* at 408.

With R80-1, the proceeding here on review, commencing only weeks after the *NAGCP III* decision, the PRC felt compelled to adhere to the D.C. Circuit's mandate, and followed the three-tier process in recommending the current rates. The Board, however, was unswept by *NAGCP III*'s wake, stating in its decision to allow the rates to take effect under protest that the three-tier process—in particular the SRC concept—was "no longer acceptable." *See* Decision of the Governors of the United States Postal Service at 15 (March 10, 1981) (hereinafter "Board's Decision"). Thus, the Board joins several parties here in challenging the D.C. Circuit's interpretation of section 3622(b).

At the outset, it is well-settled that the decisions of one Circuit Court of Appeals are not binding upon another Circuit. *See Pan American World Airways, Inc.* v. *C.A.B.*, 517 F.2d 734, 741 (2d Cir. 1975); *SEC* v. *Shapiro*, 494 F.2d 1301, 1306 n.2 (2d Cir. 1974). Our analysis of the language of the statute, its legislative history and arguments of counsel convinces us that the D.C. Circuit's interpretation of 39 U.S.C. § 3622(b) has placed unwarranted and unintended restraints upon the discretionary authority of the PRC and Board in setting postal rates and fees.

Despite the consistent interpretation accorded to section 3622(b) by the PRC and the Board in the first three rate-making proceedings,[7] the D.C. Circuit chose to reject the

---

[7] In R80-1, the fifth general rate proceeding, which is here under review, the PRC again abided by the D.C. Circuit's three-tier approach and that court's directive that it attribute and assign the costs of the Postal Service using cost-of-service principles to the fullest extent possible, and allocate only the residuum on the basis of the non-cost factors contained in section 3622(b).

The PRC declined an invitation to depart from the D.C. Circuit's three-tier approach and thereby to attempt to circumvent the D.C. Circuit's rulings by seeking appellate review in another circuit. *See* PRC Op., R80-1 at 6 n.1. The Board, however, reiterated its disagreement with the D.C. Circuit's interpretation of section 3622(b) in *NAGCP I* and *II* and determined that the use of the SRC concept in allocating costs was "no longer acceptable." *See* Decision of the Governors of the United States Postal Service at 15 (March 10, 1981) (hereinafter "Board's Decision").

two-step cost allocation analysis in favor of its three-tier approach. The *NAGCP I* and *NAGCP III* panels based their decisions upon the plain language of the statute and found support for their interpretation in the legislative history of the Act. We conclude that the D.C. Circuit failed to give sufficient deference to the agency's own interpretation of the statute, misread the plain language of section 3622(b) and misconstrued the legislative history of that section.

In *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), the Supreme Court admonished courts to accord great deference to an agency's interpretation of its enabling act:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583.

Id. Moreover, the Supreme Court has repeatedly warned courts to refrain from unwarranted intrusions into areas entrusted to agency discretion and expertise. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 534-58 (1978). "[F]undamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action." *Id.* at 558. *See generally Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251-52 (1978). We believe that the D.C. Circuit's decisions in *NAGCP I* and *III* reflect a patent disregard both for the latter considerations and for the statutory limitations on the scope of judicial review imposed by 39 U.S.C. § 3628 (1976) and 5 U.S.C. 706 (1976). It is our opinion that the D.C. Circuit erroneously supplanted the

PRC's "reasonable" construction of section 3622(b) with its own interpretation.

We cannot agree with the D.C. Circuit that a "plain reading" of section 3622(b) clearly reveals that the PRC is bound to "attribute" and "assign" costs of the Postal Service to the maximum extent possible using cost-of-service principles, and allocate only the residual costs using the non-cost factors, *see NAGCP I*, 569 F.2d at 585-87. Indeed, in *American Publishers*, the D.C. Circuit itself stated, "Section 3622(b)(3) is susceptible of a variety of interpretations, as all parties to this proceeding have recognized." 485 F.2d at 779 (Bazelon, *C.J.*, concurring, with whom Tamm & Wyzanski, *JJ.*, join) (footnote omitted). The *NAGCP I* Court's supposed "plain reading" went as follows:

> Three important points are immediately apparent. First, unlike any of the other ratesetting factors contained in section 3622(b), subsection (b)(3) is set forth as a "requirement," a fact which suggests its special role in the Act's ratesetting scheme. Second, the section uses words which further emphasize its importance by suggesting a substantial breadth to its coverage. For instance, both attribution and assignment are designed to reach "each" of the classes of mail and types of service. Moreover, not only "direct" but also "indirect" postal costs are to be attributed, and thereafter a portion of "all other costs" of the Postal Service are to be assigned. Third, the emphasis throughout the subsection is unmistakeably upon cost-of-service principles. Under the subsection each service must bear the postal costs "attributable *to* [it]" and in addition must also bear that portion of all other costs "reasonably assignable *to* [it]" (emphasis added). Thus, the very words of subsection (b)(3) disclose its concern that each class of mail and postal service shoulder all the postal costs that may reasonably be traced to the provision of that class or service.

569 F.2d at 585 (footnote omitted). The court, however, neglected to mention that section 3622(b) states that the PRC "shall" consider all of the section's enumerated factors and places no special emphasis upon subdivision (3) other than by inserting the word "requirement" in that subdivision. But that alone, we think, is too tenuous a ground upon which to base such an expansive interpretation of that provision. Indeed, had Congress intended primary importance to attach to that factor, we think that, at the very least, it would have been placed at the top of the list of factors. We believe that the true genesis of the D.C. Circuit's construction lay not in the plain language of the statute or underlying intent of Congress, but rather in the opinion of the PRC's Chief Examiner in R71-1, who stated, "The paragraph as a whole suggests that assignment of costs was to be carried out as far as it reasonably could be." *American Publishers*, 485 F.2d at 779 n.17. However, that construction was rejected by the PRC in R71-1 and consistently rebuffed thereafter until the *NAGCP I* Court directed the agency to adopt it.

Nor do we think that the legislative history of the statute supports the D.C. Circuit's interpretation. Nothing in the legislative history suggests that Congress meant to impose such rigid rules and standards for rate-setting so as to leave the PRC and Board with only minimal discretionary authority in determining how much of the postal costs a particular rate or fee was to absorb. The D.C. Circuit incorrectly equated Congress' clearly expressed intention to remove politics from the post office with removing discretion and judgment from the postal rate-making process. Congress, however, simply sought to eradicate discriminatory rate-making by creating an agency shielded from the forces of lobbyists and politics in general which in the past had caused discriminatory rate-setting while the rate-making process was conducted under the auspices of Congress. The House Report on H.R. 17070, states:

> If the American public is to have the postal service that it expects and deserves, the Post Office must be taken out of politics and politics out of the Post Office. Nineteenth century customs of political patronage have no place in a late 20th century postal system.

H.R. Rep. No. 1104, 91st Cong., 2d Sess. 6 (1970). Accordingly, the House version of the postal reform legislation advocated the removal of the Post Office Department from the President's Cabinet and creation of an independent agency—the Postal Service, the prohibition of political endorsements of candidates for positions in the Postal Service and, most important, the establishment of a Postal Rate Board which was to be independent of the Postal Service, subject only to judicial review and congressional veto, *see* H.R. 17070, 91st Cong., 2d Sess. § 1254 (1970). The Senate version, S. 3842, 91st Cong., 2d Sess. (1970), provided similar measures to remove the postal system from the political arena. For example, S. 3842 contained a provision establishing a Postal Rate Commission within an independent Postal Service, *see* S. 3842, *supra*, § 3702, but carried the matter one step further by exempting decisions of the PRC from congressional veto. Ultimately, a compromise was reached and two independent agencies were created, the PRC and the Postal Service, with neither subject to congressional veto. *See* Conference Committee Report on H.R. 17070, H.R. Rep. No. 91-1363, 91st Cong., 2d Sess. 79-80, 84-85 (1970).

That the rate-setting power was committed to agency discretion, subject to *broad* guidelines rather than specific, rigid formulae is clear. Under S. 3842, the PRC was charged with recommending rates "on the basis of general legislative criteria enacted by law." S. Rep. No. 91-912, *supra*, at 4; *see* S. 3842, 91st Cong., 2d Sess., § 3703. The "general legislative criteria" were described as follows:

> first of all, the establishment of a fair and equitable schedule; the value to both the sender and the recipient of the service actually provided each class of mail;

> operating costs and the amount of institutional costs properly assignable to each class of mail; the effect of rate increases on the general public, on business mail users, and on private entrepreneurs engaged in the delivery of non-letter mail matter; the availability and cost of alternate means of sending and receiving mail matter; cost reductions realized by the postal service as a result of mail preparation performed by the mailer prior to deposit of the mail into the postal system; simplicity of structure for the entire schedule; and such other factors as the Commission may deem appropriate.

S. Rep. No. 91-912, *supra*, at 15. That the Senate bill contemplated granting broad discretion to the PRC in its consideration of *all* of the general criteria provided by statute is made clear in the following discussion in the Senate Report on S. 3842:

> Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost. That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law. That [sic] criteria for ratemaking include seven specific *requirements*, among them, the effect of rate increases upon "enterprises in the private sector of the economy engaged in the delivery of mail other than letters." To go beyond that point would simply be to recommend provisions of law protecting a particular economic interest or limiting the availability of a Federal parcel delivery service.

S. Rep. 91-912, *supra*, at 17 (emphasis added). Moreover,

that the Senate Report refers to all of the specific factors of section 3622(b) as "requirements" is a strong indication that no one factor was intended to carry more weight than any other.

The House bill, H.R. 17070, 91st Cong., 2d Sess. § 1201(c) (1970), like the Senate bill, required that rates be established to apportion all costs on a fair and equitable basis, and further imposed a statutorily mandated floor of cost coverage for each rate. Section 1201(c) of H.R. 17070, and the original Administration bill, H.R. 11750, 91st Cong., 1st Sess. § 1201(c) (1970),[8] provided that the rate for each non-preferred class of mail absorb the costs "demonstrably related" to it. Demonstrably related costs were defined as

> [t]hose costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.

Postal Rates and Revenue and Cost Analysis: Hearings Before the House Subcomm. on Postal Rates, 91st Cong., 2d Sess. 75 (1970).

The Conference Committee reviewed the Senate and House version and compromised as follows:

---

[8] The call for a minimum rate floor first appeared in *The Report of the President's Commission on Postal Organization* (1968) (hereinafter "Kappel Commission Report"). The Kappel Commission determined that the then existing postal rate structure and Cost Ascertainment System employed in setting rates were inadequate. The Commission recommended that each class of mail should recover those costs "which it alone causes . . . whether these costs are capital costs or operating costs plus a reasonable share of all other costs." *Id.* at 131. The Commission suggested that discrimination in rates would not occur as long as each class covered "as a minimum, the long-run variable costs ascribable to it—the full added costs demonstrably related to that class." *Id.* This suggestion was embodied in the Administration's bill, H.R. 11750, *supra*, and the subsequent House bill, H.R. 17070, *supra*.

> The House bill contained provisions requiring that (1) rates be established in such a manner so as to apportion the costs of all postal operations on a fair and equitable basis, and (2) rates for each class of postal service cover the demonstrably related cost of such service. The Senate amendment also contained the requirement that postal rates be established in such a manner so as to apportion the costs of all postal operations on a fair and equitable basis, and provided several additional standards to be considered in making rate determinations. The conference substitute adopts the Senate provision with an amendment which incorporates the standard that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.
>
> The provision in the conference substitute with respect to costs attributable to a class of mail or type or service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.

H.R. Rep. No. 91-1363, 91st Cong., 2d Sess. 87 (1970). Thus, section 3622(b), as enacted, represents a combination of (1) the common *primary* factor between the House and Senate bills that rates be established on a fair and equitable basis, (2) the non-cost factors provided in the Senate bill and (3) the rate floor provided by the House bill. The Conference Committee report quoted above makes it clear beyond cavil that the "direct and indirect costs attributable" language was intended to provide a rate floor just as was the "de-

monstrably related" language in the House bill. The additional language in section 3622(b)(3) that each class of mail is to bear "that portion of all other costs . . . reasonably assignable to such class" is explained in the Committee report as providing for a "judgmental assignment of some part of the remaining costs." The report neglects, however, to mention just what criteria are to be employed by the PRC in making that "judgmental assignment."

From our "plain reading" of the statute and review of its legislative history we conclude that the D.C. Circuit erred in *NAGCP I* and *III* in holding that section 3622(b) requires the PRC to attribute and assign costs to the maximum extent possible using cost-of-service principles. We view the statute, as did the D.C. Circuit panel in the *American Publishers* case, *i.e.*, as "susceptible of a variety of interpretations." 485 F.2d at 779.

Moreover, we find Judge Wyzanski's comments concerning section 3622(b) in the majority opinion in *American Publishers* instructive:

> Like most other factors sheets, whether in statutes, A.L.I. Restatements, or comparable compilations, the factors listed are not analogous to a table of atomic weights, or to the multiplication table. The factors are reminders of relevant considerations, not counters to be placed on scales or weight-watching machines.
>
> No one who seeks fairly and equitably to determine a complicated rate structure ought to suppose that there is a correct answer, or even that in the final mix there should have been added a specified number of spoonfuls of each of the ingredients. A conscientious, competent rate-making body proceeds by opening its mind to relevant considerations, and closing its ears to irrelevant ones. It is governed by policies not politics.
>
> A reviewing court under familiar jurisdictional principles may not, and under human limitations generally could not, reassess the weights given by a rate-making

> agency to different factors, absent a legislative direction as to precisely what gravity each factor bears. All that the court may properly do is to consider whether the agency did take into account all the relevant factors and no others.

485 F.2d at 774-75. We are convinced that the only "legislative direction as to precisely what gravity each factor" in section 3622(b) should bear is the "requirement" in subdivision (b)(3) that each class or service bear as a minimum the direct and indirect costs attributable to that class or service. Beyond that, the statute only provides that the PRC "shall" consider *all* of the enumerated factors. And as to the level of attribution required, we conclude that the definition of that term in the Conference Committee report is controlling. Therefore, we reject the D.C. Circuit's rulings to the extent that they interpreted section 3622(b) as requiring the attribution and assignment of costs based on cost-of-service principles to the maximum extent possible. There is nothing in the legislative history to suggest that attribution of fifty percent of postal costs is inadequate.[9] We believe that Congress intended that the PRC enjoy much more discretion and greater latitude in its rate-setting determinations.[10]

This is not to say, however, that the rates set in accordance

---

[9] In *NAGCP I*, the D.C. Circuit rejected the PRC's attribution of approximately 50% of postal costs using a volume variability technique as inadequate. 569 F.2d at 582, 590-92 & n.81.

[10] The influential Kappel Commission Report advanced the same view in criticizing the fully allocated-cost program known as the Cost Ascertainment System then in use:

> The Post Office uses a Cost Ascertainment System, authorized by a 43-year old statute, for determining the revenues, volume and cost of each class of mail. For determining costs, it uses the "fully-allocated" method through which every postal expense is charged to some class of mail or special service. *A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary but uninformative.*

See Kappel Commission Report, *supra*, note 8, at 30 (emphasis added).

with the D.C. Circuit's directives must necessarily be deemed unlawful. Quite to the contrary, just as we find no support for the extreme position taken by the *NAGCP I* and *III* Courts, we could not hold as a matter of law that the cost allocation methodology used by the PRC in R80-1 was impermissible under section 3622(b). Upon remand, the PRC may still adhere to the methodology it has employed in R80-1, and under our interpretation of the statute it is free to do so.

SERVICE-RELATED COSTS

The PRC's recommended decision included the assignment of over $1.8 billion on the basis of the Service-Related Cost concept. The Board, however, in the face of *NAGCP III*'s endorsement of SRC, expressly rejected the concept in its decision which allowed the recommended rates to take effect under protest. *See* Board's Decision, *supra*, at 14-15. Several parties have intervened in this litigation to support the use of SRC in assigning costs.[11] Other parties, however, take the position that since the concept was developed in response to the D.C. Circuit's erroneous interpretation of section 3622(b), the concept itself must also be erroneous.[12]

It seems clear that the Postal Service would never have conjured up the SRC concept to "assign" certain postal costs had the *NAGCP I* Court not demanded such extensive use of cost-of-service principles in rate-making. In R77-1, the rate proceeding in which SRC made its debut, the PRC made clear that the concept was being employed to meet the

---

[11] The parties supporting the SRC concept are: Intervenors Warshawsky & Co. and International Labor Press Association, AFL-CIO/CLC; Intervenors Direct Mail/Marketing Ass'n, Inc., Mail Order Ass'n of America, Inc.; and Intervenors March of Dimes Birth Defects Found., American Lung Ass'n, National Easter Seal Soc'y, St. Jude Children's Research Hospital, American Cancer Soc'y, and National Wildlife Fed'n.

[12] The parties opposing the SRC concept are: Respondent United States Postal Service; Petitioners Publishers, Council of Public Utility Mailers and United Parcel Service and Intervenor National Ass'n of Greeting Card Publishers.

directive of *NAGCP I* that costs that are untraceable through causal relationships such as volume variability should nevertheless be reasonably assigned "among the classes using cost-of-service techniques as opposed to the methods the [*NAGCP I*] Court found 'discretionary' which had been used to distribute residual costs." PRC Op., R77-1 at 122. The PRC concluded in R77-1:

> We find, based on our analysis, that the service-related cost method advanced by the Postal Service for the assignment of costs to particular classes and services (1) is consistent with the requirements of § 3622(b)(3) of the Postal Reorganization Act as interpreted by the Court of Appeals in *NAGCP I;* (2) represents a logical and practical application of cost-of-service principles to the field of postal ratemaking; (3) is based on a concept which, while there are no plans to implement it, would be capable of being implemented; (4) is supported by the record developed in this proceeding; and (5) that, as adjusted by us, is a reasonable method for the estimation of the portion of fixed delivery costs incurred by the Postal Service in providing preferential mail service and the assignment of such costs to the classes receiving such services. Accordingly, we have decided to adopt service-related costs for the purpose of determining the rates to be recommended in this proceeding.

Id. at 123. The *NAGCP III* Court then reviewed the SRC concept, finding it to be "reasoned, nonarbitrary, and congruent with the legislature's objective." 607 F.2d at 404.[13]

---

[13] The *NAGCP III* Court did agree with the argument of the first-class users that "there is good reason, in economics and common sense, to call upon nonpreferential classes to contribute to the capacity costs used in providing them a benefit." 607 F.2d at 409 (footnote omitted). Nevertheless, the court could not conclude that the Postal Service had abused its discretion in assigning the SRC to the preferential users. The Magazine Publishers, red-tag users (a preferential class), complained that they only "needed" two days a week of service and therefore should not have to bear the costs of six-day-a-week service. Again, however, the court could not conclude that the allocation of costs was unrea-

Nevertheless, in the rate-making proceeding on review before us the Postal Service withdrew its sponsorship of the SRC concept, characterizing its own brainchild as "patently unrealistic." *See* Board's Decision, *supra*, at 14. The Board stated:

> "Service-related costs" were used for the first time in the last rate case, Docket No. R77-1, in what then appeared to be a reasonable attempt to conform to the Court of Appeals' strongly expressed emphasis in *NAGCP I* on assignment and attribution of costs. Whatever the justification at that time, substantial increases in mail volumes since then call into question the hypothetical assumptions on which the theory was based. And recent costing studies have lessened whatever need there formerly was to strain for concepts that might reduce the apparent scope of "judgment" in allocating postal costs. Accordingly, by the time the present case was filed in April 1980, the Board of Governors was able to make it clear that it regarded the concept as no longer acceptable.
>
> No one who is informed on postal matters can seriously suppose that the Postal Service would make regular deliveries only three days a week if a few paragraphs concerning priorities were cut out of some internal operating instructions. Yet, without precisely this supposition, the whole "service-related cost" methodology is meaningless. Reasoned decisionmaking cannot tolerate the assignment of over $1.8 billion on the basis of such a transparent fiction.

---

sonable. *Id.* at 410. Other arguments of the red-tag users and of third and fourth class parcel mailers, also preferential classes, were rejected on the same grounds. *Id.* at 410-11.

The court did agree, however, that it was unreasonable to assign to all of second class mail the service-related costs caused by red-tag second class, which comprised only 40% of the entire class. The court concluded that the PRC's failure to distinguish between preferential and nonpreferential mail in the assignment of costs was unreasonable. *Id.* at 411.

Id. at 14-15 (footnote omitted).

The PRC, faced with both the D.C. Circuit's endorsement of the SRC concept and the Postal Service's rejection of it, chose the judicially sanctioned road, stating that the Postal Service's alternative provided "no basis for abandoning an approach to cost tracing that the court of appeals has found acceptable." PRC Op., R80-1 at 151. Now the Postal Service, truly at odds with the PRC, joins several other parties on this appeal in challenging the SRC concept.

Our ruling concerning the appropriate interpretation of section 3622(b) does not *ipso facto* dispose of the issues concerning the propriety of using the SRC concept. There is nothing in the legislative history to suggest that the PRC cannot use *cost* factors in "reasonably assigning" a "portion of all other costs" of the Postal Service to a particular class or service. The section, as we have already stated, simply requires that all of the enumerated factors be considered and that each class of mail and mail service bear, as a minimum, the direct and indirect postal costs attributable to that class or service, as defined in H.R. 91-1363, 91st Cong., 2d Sess. 87 (1970).

While we reject the D.C. Circuit's holding that the PRC is required to employ cost factors in the assignment tier of the rate-making process, we also conclude that the deferrability aspect of non-preferential mail and the hypothetical three-day versus six-day system is not an unreasonable methodology to use in assigning costs. Thus, we agree with the D.C. Circuit statement in *NAGCP III* that

> While some of its assumptions are, to put it mildly, optimistic, we cannot say that the system is so unrealistic a model as to call into question the rationality of the conception underlying service related costs.

607 F.2d at 409-10.

Since the SRC concept was developed in specific response to the D.C. Circuit's erroneous interpretation of section 3622(b), however, we seriously question whether the PRC

will remain adamant in its employment of SRC once the strictures of *NAGCP I* and *III* have been finally removed.

THE REVENUE REDUCTIONS[14]

The Board's decision to protest the PRC's recommended rates was primarily directed toward five revenue reductions which would cut the Postal Service's operating capital by about $1 billion. Reductions were recommended by the PRC in the areas of prior years' losses, the provision for contingencies and the Civil Service Retirement Fund. Further reductions were to be generated by adopting a new measuring device for productivity and by applying a higher discount factor than had been used in the past to accrued workers' compensation liabilities. The Board, in returning the recommended decision for reconsideration, described one such reduction as "patently unlawful," another as "unreasonable" and still a third as "unrealistic." *See* Board's Decision, *supra*, at 9.

The Postal Service, on this appeal, contends that the PRC's staggering revenue recommendations would "deprive postal management of its lawful authority to exercise its discretion as to the timing of rate filings" by leaving the rates so unrealistically low as to necessitate a further rate-making proceeding in the near future. *See* Brief of United States Postal Service at 32. The result would be an "endless morass of borrowing and filing for higher rates with interminable, overlapping rate proceedings." *See* Board's Decision, *supra*, at 4.

In reviewing the legality of the revenue reductions, we first recognize, as did the D.C. Circuit in a recent case having

---

[14] On October 1, 1981 the Board announced that it had voted unanimously to increase the price of a first-class postage stamp to twenty cents effective November 1, 1981. Nevertheless, we do not consider the revenue reductions issues moot, inasmuch as the Board's increase has since been challenged in the United States Court of Appeals for the District of Columbia Circuit, *National Ass'n of Greeting Card Publishers* v. *United States Postal Service*, Docket No. 81-2063 (D.C. Cir., filed Sept. 30, 1981).

great bearing on these issues, that Congress intended "to vest in the Board of Governors exclusive authority to manage the Postal Service." *Governors of United States Postal Service* v. *United States Postal Rate Commission*, 654 F.2d 108, 114 (D.C. Cir. 1981) (*Governors*). The *Governors* Court declared that while Congress envisioned the PRC and Board to be partners,

> [t]here is no indication that Congress contemplated that either "partner" would trench on the functions and prerogatives of the other; on the contrary each was to recognize and be guided by its "constitutional and legal responsibilities." Congress did not intend that the Postal Rate Commission regulate the Postal Service; one partner does not regulate another, and authority to assist in ratemaking and classification does not include authority to interfere in management. It follows that a management decision by the Postal Service may not be overruled or modified by the Rate Commission.

Id. at 114-15.

At issue in *Governors* was the propriety of a PRC recommended decision on a Postal Service proposal to enter the field of electronic mail (E-COM). The Postal Service requested the PRC to recommend a decision on a change in the classification schedule to establish E-COM as a new subclass of first class mail. The PRC recommended the new subclass only on an "experimental" basis. The Board claimed on appeal that the PRC's decision went beyond its statutory authority and undermined the management authority of the Board. The D.C. Circuit agreed, *id.* at 115, and concluded, "It is not the function of the Rate Commission to regulate the management of the Postal Service. . . . We hold that by so doing the Rate Commission exceeded its authority and strayed from its ratemaking and classification powers to intrude upon the management functions of the Board of Governors," *id.*

We see no reason to review in this case the legislative

history that was so thoroughly analyzed by the D.C. Circuit in *Governors*. *Id.* at 113-15. We agree that Congress intended the Board to have "exclusive authority to manage the Postal Service," *id.* at 114, and conclude that the PRC's recommended decision in this case, which drastically reduced the Postal Service's revenue requirements, had the effect of undermining the Board's exclusive authority in timing changes in postal rates and fees. Thus, as in *Governors*, the PRC has improperly encroached upon the managerial authority of the Board.

Section 3621 of the Act states, "Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service." Section 3622(a) grants the Postal Service broad discretion over the timing of rate and fee changes:

> From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services *if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.*

39 U.S.C. § 3622(a) (emphasis supplied). Whether or not it was the intent of the PRC to cause more frequent rate filings by eliminating nearly $1 billion from the Postal Service's revenue requirements, the Board determined that the PRC's action would necessarily have that effect. The Board in its decision approving the PRC's recommended decision under protest stated:

> The Commission's recommended decision would jeopardize the long-term stability of the Postal Service for the illusory short-term benefit of lower postal rates. In fact, even in the short term, the Commission's recom-

> mendation simply would not yield enough revenues to cover postal costs. This shortfall would lead to a rate filing as soon as possible by the Postal Service, another protracted rate proceeding, and another period of uncertainty for business mailers and the general public.

Board's Decision, *supra*, at 7.

Specifically, the PRC eliminated $449 million from the revenue schedule for the recovery of prior years' losses on the ground that the losses were

> the direct consequence of a determination made by the Governors not to file this rate case until April 21, 1980. . . . Because this action contravenes the § 3621 break-even requirement, it is not in accord with the honest, efficient and economical standard of management prescribed for the Postal Service. Thus, for this proceeding, we are disallowing prior year losses from the Postal Service's revenue requirement.

PRC Op., R80-1 at 59. The Board characterized the PRC's action as "disciplinary" and declared that "nothing in the Postal Reorganization Act empowers the Commission to act as disciplinarian." Board's Decision, *supra*, at 10. We agree with the Board. The authority to file a rate proceeding lies, in the first instance, with the Board. The PRC cannot be permitted to frustrate the managerial authority of the Board with such divisive bureaucratic tactics. The PRC's unexplained departure from past decisions recommending the inclusion of provisions for prior years' losses was arbitrary and thus should be set aside. To the extent that the PRC claims that its decision was based on the "delinquency" of the rate request filing, that reason is simply insufficient. We stress that the Board, and not the PRC, is responsible for making policy decisions for the Postal Service. Should the Board exceed its authority or make questionable policy choices, remedies may be pursued through congressional amendment or judicial review. Further, the President may

influence the Board's policy decisions through his appointment powers. Aside from these checks, the Board is free to fashion the policies of the Postal Service without interference, including from the PRC.

With respect to the PRC's reduction of the contingency provision, we conclude that this decision also was an unlawful intrusion into the policy-making domain of the Board. Section 3621 of the Act specifically provides that the Postal Service's "total estimated costs" shall include "a reasonable provision for contingencies." Pursuant to that mandate, the Board included a provision for $665.7 million to cover contingencies equal to three percent of total accrued costs for the test year. The PRC slashed the contingency fund to 1.8 percent, or approximately $400 million. Though the PRC stated that it had recommended a 2.5 percent contingency fund, that amount included $44.1 million for increases in cost-of-living adjustments, amounts the Board viewed as actual rather than contingent expenses. In view of the four percent contingency provision approved by the Board in the last rate case, *see* Board's Decision, *supra*, at 12, we agree with the Board that the reduction of the fund to less than half the percentage of the previous rate filing was arbitrary.

The PRC also slashed $143 million from the Postal Service's revenue requirements by recalculating Postal Service productivity using two methodologies not introduced during the hearings. The PRC sent out a Notice of Inquiry eleven days after the evidentiary record had closed and gave the parties seven days to file briefs and twenty days to comment. No discovery or cross-examination was permitted. We conclude that the PRC's action violated the mandate contained in 39 U.S.C. § 3624(a) that the PRC base its decisions upon materials presented at record hearings conducted pursuant to 5 U.S.C. §§ 556 and 557. Since the PRC's productivity adjustments were not based on record evidence, they must be set aside. On remand the PRC is directed to subject its productivity adjustment rationale to the same hearing pro-

cess as all other materials upon which it bases its recommended decisions.

We make no comment on the PRC's other reductions of the Postal Service's revenue requirements except that, on remand, the PRC should refrain from making arbitrary adjustment of the Postal Service's estimates in order to stimulate more frequent rate filings and should articulate its reasons for any modification of the schedule proposed by the Board.

We feel compelled to admonish the Board and PRC to obey an implicit command of the Act that they cooperate. In its final report, the Senate Committee stated:

> The President shall appoint a bipartisan Postal Rate Commission, each Commissioner to serve for 6 years. The Rate Commissioners shall be independent of the Board of Governors. They shall appoint their own staff and conduct their own business, subject to the Administrative Procedures Act, as they wish. The committee envisions the Commission to be an integral part of the postal service, to be a true partner of the Board of Governors in every aspect of postal operations. If a bureaucratic struggle between the Board and the Commissioners develops, then the whole theory of independent ratemaking judgments will have failed and the Congress will probably be called upon to revise the system. But if the individuals appointed to the Board on the one hand, and the Commission on the other, recognize the constitutional and legal responsibilities of their position and work together to achieve a truly effective postal service, then the independence of the Commission will serve a vitally important function by permitting them to view the overall impact of postal costs with a degree of detachment which the committee considers vitally important to preserve the public interest and public investment in the largest civilian agency of the Federal Government.

S. Rep. No. 91-912, *supra*, at 13. Unfortunately, it appears that just such a "bureaucratic struggle" has ensued. We hope that the PRC and Board can achieve greater harmony to avoid the necessity of Congress' having to enact corrective legislation.

THE BOARD'S "MODIFICATIONS"

Petitioner United Parcel Service (UPS) charges that the Board unlawfully modified the PRC's recommended decision in violation of 39 U.S.C § 3625.[15] More precisely, UPS argues that the Board is vested with statutory authority on its initial review of a PRC recommended decision to approve the entire decision, reject the entire decision or allow the entire decision to take effect under protest. In the present case, however, the Board, while selecting the latter course, also effected several "modifications" relating to classification provisions, second class "red tag" rates, third class bulk mail

---

[15] Section 3625 provides in pertinent part:

(a) Upon receiving a recommended decision from the Postal Rate Commission, the Governors may approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section.

(b) The Governors may approve the recommended decision and order the decision placed in effect.

(c) The Governors may, under protest, allow a recommended decision of the Commission to take effect and (1) seek judicial review thereof under section 3628 of this title, or (2) return the recommended decision to the Commission for reconsideration and a further recommended decision, which shall be acted upon under this section and subject to review in accordance with section 3628 of this title.

(d) The Governors may reject the recommended decision of the Commission and the Postal Service may resubmit its request to the Commission for reconsideration. Upon resubmission, the request shall be reconsidered, and a further recommended decision of the Commission shall be acted upon under this section and subject to review in accordance with section [3628] of this title. However, with the unanimous written concurrence of all of the Governors then holding office, the Governors may modify any such further recommended decision of the Commission under this subsection if the Governors expressly find that (1) such modification is in accord with the record and the policies of this chapter, and (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations will equal as nearly as practicable estimated total costs.

rates, and Bulk Mail Centers. For the reasons set forth below, we find that the Board acted properly and within the statutory framework.

At the outset, we take note of the delicate power structure of the Postal System, just discussed during the course of our review of the revenue reductions. Crucial to this structure is that the Board of Governors manage the system by virtue of the powers vested in it by 39 U.S.C. § 202, such powers including the approval of rate and classification recommendations made by the PRC. 39 U.S.C. § 3625. The PRC, on the other hand, serves an equally viable function in being responsible to make lawful recommendations to the Board. *See generally Governors*, 654 F.2d at 109-10.

While it is generally true that section 3625 by its terms limits the Board's response to an initial PRC rate recommendation to acceptance, rejection, or acceptance under protest, we do not read that section so strictly as to emasculate the Board's authority to disregard improper recommendations which would encroach upon its independent management and reviewing powers. The PRC, reading section 3625 more strictly than we do, attempted to circumvent the Board's scrutiny in R80-1 by appending several classification changes to its rate recommendations, believing that the Board would be pressured to accept them in light of the limited responses available to the Board under the section.

Specifically, the PRC recommended third class bulk rates which were inconsistent with the existing classification schedule. In effect, the PRC's rates were contingent upon a change in classification which had neither been discussed nor proposed in any record proceeding. The PRC also submitted rates for second class mail assuming the existence of a proposed dual rate structure based on whether delivery was expedited or not. While such a dual structure had been approved by the Board in a separate proceeding to take effect several months later, as of the date of the Commission's recommended decision the structure simply did not exist. We find that the other challenges by UPS similarly concern

changes in classifications and rates which are normally subject to the Board's scrutiny under sections 3623 and 3625. The Board properly disregarded these changes which were, legally and practicably speaking, impossible to implement. Once these changes were disregarded, the Board acted properly in filling the gaps by establishing temporary rates pursuant to its authority under section 3641(a).[16]

Our view of section 3625 finds support in the language of the section. UPS would have us insert the word "entire" in the section before each option given to the Board concerning a PRC recommended decision. However, where Congress sought to ensure that an *entire* decision be either rejected or approved, but unaltered, for example on review before this Court, it clearly stated such strictures:

> The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision.

39 U.S.C. § 3628 (1976). Moreover, UPS' reading would produce a statutory inconsistency by allowing the PRC to dilute the Board's powers of review simply by introducing inappropriate changes during the course of a rate-making proceeding. The Board would face a dilemma, as it did in

---

[16] 39 U.S.C. § 3641(a) (1976) provides:

> In any case in which the Postal Rate Commission fails to transmit a recommended decision on a change in rates of postage or in fees for postal services to the Governors in accordance with section 3624(c) of this title, the Postal Service may establish temporary changes in rates of postage and in fees for postal services in accordance with the proposed changes under consideration by the Commission. Such temporary changes may take effect upon such date as the Postal Service may determine, except that such temporary changes may take effect only after 10 days' notice in the Federal Register.

The PRC insists in its Opinion Upon Reconsideration, *supra*, note 4, that the Board's reliance on section 3641(a) is improper since the PRC did not fail "to transmit a recommended decision on a change in rates . . . ." *Id.* at 117-18. It is clear, however, that if the PRC's initial recommendations were disregarded as improper and impossible to implement, the net effect was the same as a failure by the PRC to transmit a recommended decision within the meaning of section 3641.

the present case, of having to reject the entire recommended decision in order to object to a small and improper change—the cost being the loss of much needed revenues to the Postal Service. We cannot believe that Congress intended such a result.

We stress, however, that our interpretation of section 3625 is narrow—we do not extend to the Board an open invitation to alter the provisions of initial PRC rate-making recommendations. Such a result would jeopardize the PRC's proper role within the statutory framework. We conclude only that the limited changes made by the Board in allowing the PRC's overall recommended decision in R80-1 to take effect under protest were not "modifications" in violation of section 3625, but were instead proper responses under the circumstances.

ATTRIBUTION CHALLENGES

We next address several challenges to specific attributions of costs by the PRC in its recommended decision. In both cases, we conclude that the PRC's findings were supported by substantial evidence in the record and therefore decline to disturb either attribution.

Newsweek, Time and Magazine Publishers Association (Publishers) challenge the PRC's attribution of over ninety-six percent of purchased transportation costs. Specifically, Publishers contest the PRC's finding that "latent capacity costs" in purchased transportation—defined as the "[s]pace acquired for postal use and available, at no additional charge, for the conveyance of mail," *see* PRC Op., R80-1 at 174—are volume variable and thus properly attributable under section 3622(b).[17] Publishers contend instead that these

---

[17] While the PRC found that 96% of the transportation costs were volume related and thus attributable, the Postal Service concluded that only 74% of the costs related to volume factors. Publishers contend that no causal link exists between the occurrence of latent capacity costs and the need for preferential mail classes and therefore argue that *none* of the costs are properly attributable. *See* Brief of Petitioners Newsweek, Inc., Time Incorporated, and Magazine Publishers Assn., Inc. at 33.

costs are not causally linked with any special mail characteristic, and, being unpredictable in nature, should therefore lapse into the "residual," unattributable category of section 3622(b). In light of our interpretation of section 3622(b), it follows that these costs are properly attributable if they are volume variable. Our task on review, then, is to determine whether the PRC's finding of volume variability is supported by substantial evidence in the record.

We first observe that the PRC has been able to attribute over ninety percent of purchased transportation costs in each of the past three rate-making proceedings. *See* PRC Op., R80-1 at 174 n.4. Furthermore, the PRC was addressed by witnesses of ten parties on this subject, with evidence supporting as well as rejecting a conclusion of volume variability. Publishers highlight the testimony of one witness who stated that the causes of latent capacity costs were irregularity, unpredictability, rigidity of supply and inefficiency of postal contracting procedures, but not volume changes. The PRC found, however, that it is reasonably able to predict such costs over a period of time on the basis of volume variations. *Id.* at 182. In assessing the PRC's findings, "[w]e should not, and indeed cannot substitute our judgment for that of the Commission . . . ." *Mt. Mansfield Television, Inc.* v. *F.C.C.*, 422 F.2d 470, 482 (2d Cir. 1971). Rather, we accord appropriate deference to the expertise of the agency in its own field. *See Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973). Accordingly, we choose not to disturb the PRC's findings.

In addition, UPS, a primary competitor of the Postal Service's parcel post, alleges that the PRC failed to attribute enough costs to parcel post.[18] UPS takes particular issue with a new parcel post classification and rates adopted for parcels having both their origins and destinations within any one of the Postal Service's Bulk Mail Centers ("BMCs") or

---

[18] In fact, at the PRC hearings UPS requested that parcel post rates be increased by a staggering 22%. PRC Op., R80-1 at 476.

Auxiliary Service Centers ("ASCs").[19] The PRC determined that intra-BMC parcels have lower processing costs than parcels processed through more than one BMC and should therefore be accorded lower rates. *See* PRC Op., R80-1 at 500-06.

UPS alleges contrary to the PRC's findings that the basis for the BMC rates, a study of costs incurred at the San Francisco BMC, is not reflective of the entire BMC network and that the rates are therefore arbitrary, capricious and without substantial evidentiary support. 5 U.S.C. § 706(2)(A) & (E) (1976). Specifically, UPS charges that because the study was never filed as part of the record,[20] it could not properly be relied on by the PRC, and that, in any event, "data for two weeks at one BMC" is inadequate support on which to base rates, due to differences in productivity rates and sizes among the BMCs. *See* Brief for UPS at 31-36.

We are convinced that the San Francisco study constituted adequate support for the PRC's new classification and rates under the standards of 5 U.S.C. § 706. The study made reasonable adjustments to control for variations in size and volume among the BMC facilities. Furthermore, even though the study was never formally filed as an exhibit by a sponsoring party, we agree with the PRC, *see* PRC Op., R80-1 at 505, that the Postal Service's production of the study's model and data during the hearings provided the parties with sufficient time for analysis and cross-examination to meet the requirements of 39 U.S.C. § 3624(a) (1976). We therefore decline to disturb the BMC rates. We similarly find without merit a related challenge by UPS which alleges that

---

[19] There are currently 21 BMCs and 10 ASFs. The Service also includes as part of the BMC network Alaska, Hawaii and Puerto Rico. PRC Op., R80-1 at 496 & n.7.

[20] The San Francisco study apparently was never filed by a sponsoring party at the PRC's hearings; instead, it was submitted as a Library Reference and obtained by the parties through use of discovery devices. *See* PRC Op., R80-1 at 502.

the PRC improperly exempted intra-BMC parcels from a fifty-cent surcharge for nonmachinable parcels.

PRESORTED MAIL

Petitioner the Council of Public Utility Mailers (CPUM), a joint committee of the American Gas Association and the Edison Electric Institute, contests the PRC's treatment of presorted first-class mail as a rate category of first-class mail as opposed to a subclass. Simply put, CPUM argues that if treated as a rate category, presorted first-class mail will be forced to shoulder a portion of costs attributed to "single piece" first-class mail. CPUM therefore seeks to have presorted mail denominated a subclass of first-class mail to be accorded an independent rate-making assessment pursuant to section 3622(b).

CPUM contends that the PRC's decision to treat presorted mail as a rate category was in violation of the classification provisions of Title 39 and is unsupported by substantial evidence. We disagree. The PRC has vast discretion to recommend classification changes under 39 U.S.C. § 3623. Unlike the Act's rate-making provisions, which require a "request" from the Board of Governors before the PRC may recommend rate changes, *see* 39 U.S.C. § 3622(a), section 3623 allows the PRC to recommend classification changes "on its own initiative." Still, this discretion is limited by section 3623's requirement that the PRC base its recommendations on six enumerated factors.[21] Furthermore, section

---

[21] Section 3623(c) provides:

> The Commission shall make a recommended decision on establishing or changing the schedule in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable classification system for all mail;
>
> (2) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;
>
> (3) the importance of providing classifications with extremely high degrees of reliability and speed of delivery;

3624 requires that the PRC conduct "a hearing on the record" before making classification recommendations.

The crux of CPUM's argument is that presorted first-class mail was definitively established as a subclass as part of a classification schedule adopted in 1979, *see* Docket No. MC76-5, and has been treated as a subclass in virtually every PRC pronouncement since. CPUM recognizes the PRC's discretion over classifications and concedes that the PRC is free to change presorted mail's status from a subclass in a future classification proceeding. Still, CPUM asserts that "no substantial evidence was offered [in the present case] to support the declassification of Presorted Mail from subclass status to a 'rate category' status." *See* Brief for CPUM at 13. CPUM also attacks the PRC's consideration of the subclass status in the context of a rate-making proceeding. *Id.* at 6.

The Postal Service failed to address this issue on appeal. Still, it appears from the record that the PRC, while conceding that as a subclass presorted mail would be independently analyzed under section 3622(b), concluded after a lengthy discussion that presorted mail should not be accorded that status. Instead, the PRC chose to offer presort discounts to reflect the resulting savings to the Postal Service. The PRC never mentioned the existence of the 1979 classification schedule in its recommended decision to treat presorted mail as a rate category.

Even if presorted first-class mail has been treated as a subclass in the past, we can see no reason why a change in classification treatment may not occur during the course of a rate-making proceeding. It is widely recognized that classification and rate-making categories "inevitably overlap." *See United Parcel Service, Inc.* v. *United States Postal Service,*

---

(4) the importance of providing classifications which do not require an extremely high degree of reliability and speed of delivery;

(5) the desirability of special classifications from the point of view of both the user and of the Postal Service; and

(6) such other factors as the Commission may deem appropriate.

615 F.2d 102, 110-11 (3d Cir. 1980). In fact, the Postal Service itself, in initiating Docket No. R80-1, requested changes in classifications as well as rates. The consideration of presorted mail's subclass status by the PRC was therefore proper.

Our review of the record indicates compliance with the statutory provisions governing classifications as well as ample support for the PRC's recommendation to treat presorted first-class mail as a rate category. All that the statute requires as a prerequisite to a recommended classification change is a hearing and consideration of the specific factors enumerated in section 3623. *See* 39 U.S.C. §§ 3623, 3624 (1976). The PRC heard extended testimony concerning subclass status, and the PRC fully examined the specific classification factors before reaching its decision. *See* PRC Op., R80-1 at 266-80. Based on the evidence presented, the PRC concluded that the cost characteristics and market demand elements of presorted first-class mail are not sufficiently different from that of regular first-class mail to justify subclass status. In light of the discretion accorded to the PRC in the area of classifications, we cannot say that the PRC's decision to allow presort discounts as opposed to separate subclass rates was unlawful or without substantial evidentiary support.

In addition, Publishers claim that the levels of presort discounts for second-class mail as set by the PRC do not accurately reflect the cost savings to the Postal Service of presorting.[22] During the PRC's hearings, an updated study of presortation was introduced which Publishers claim sup-

---

[22] Publishers' theory is that the congressional directive that the PRC's recommended decision reflect "the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service," 39 U.S.C. § 3622(b)(6), will not be met if presort discounts do not accurately reflect the cost savings of presortation to the Postal Service. *See* Brief for Newsweek, Inc., Time Incorporated and Magazine Publishers Ass'n, Inc. at 38-39.

The Postal Service responded that it does not capture the full amounts of the cost differentials represented by mailer presortation and, therefore, that deepened discounts are not justified. *See* Brief for United States Postal Service at 47.

ported deepened discounts. The PRC, however, rejected the study as an inadequate basis on which to expand discounts, although it found the study to be sufficient support to retain the existing discounts. *See* PRC Op., R80-1 at 376-81. Publishers now assert that "the failure of the Commission and the Governors to deepen the presort discounts for regular rate second class mail is unsupported by substantial evidence in the record. . . ." *See* Reply Brief of Petitioners Newsweek, Inc., Time Incorporated, and Magazine Publishers Association, Inc. at 22.

A reviewing court may not overturn an agency finding simply because evidence existed supporting an alternative finding. Rather, in applying the substantial evidence standard set forth in 5 U.S.C. § 706(2)(E) we must first determine that a "reasonable mind" could not find the evidence on which the agency relied to be "adequate" to support its conclusion. *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 253 (1978); *Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 229 (1938).

While the updated study may have presented a strong argument to the PRC in favor of deepened discounts, we believe that the PRC's rejection of that study and subsequent retention of the existing discounts was adequately supported by the record. The study was based on data collected from the first quarter after new regulations governing presortation had become effective in 1979. While Publishers argue vigorously that the study constituted a reliable basis to support deepened discounts, the PRC simply concluded otherwise:

> [D]ata from this initial quarter of the regulation change, while not worthless, are inadequate to show permanent changes caused by this regulation change without, at least, the cost studies which supported the change, if indeed cost studies were used. . . . More than one quarter of data is needed to discern the effects of these new regulations, before the evidence that can support an enlarged second-class presort discount will exist.

PRC Op., R80-1 at 379-80 (footnotes omitted). Once the

PRC had rejected the study, it was left with insufficient evidence to support an expansion of discount rates. Therefore, the PRC recommended retaining the existing presort discounts.

On the basis of the record before us, we find that the PRC's recommended presort discounts for second-class mail are supported by substantial evidence.

Conclusion

We conclude that both the rate-making procedure followed by the PRC in R80-1 and the use of Service-Related Costs within that procedure are consistent with the provisions of 39 U.S.C. § 3622(b) (1976). However, we reject the holdings of the District of Columbia Circuit in *NAGCP I* and *III* which mandated the three-tier process used by the PRC in setting the present rates. The PRC is free, on remand, to continue to use those methodologies employed in the rate-making proceeding here on review, but it may, if it wishes, return to the methodologies used in the first three rate-making proceedings or develop alternative methodologies which comport with the requirements of section 3622(b), as we interpret it.

We also conclude that the PRC's findings with respect to first and second-class presort discounts as well as the particular attributions challenged in this action are supported by substantial evidence in the record, and we therefore decline to disturb those findings. The Board's response to the PRC's initial recommended decision is also found to be consistent with its powers as set forth in 39 U.S.C. § 3625 (1976).

We hold, however, that the PRC's reductions of the Postal Service's general revenue requirements was an unlawful encroachment upon the policy-making authority of the Board, and therefore remand this case for further consideration in light of this opinion.

Remanded for further consideration in light of this opinion. Each party shall bear its own costs.

700-11-2-81 • USCA-5673
WORLD COMPOSITION SERVICES, INC.,
432 Park Ave. S., N.Y. 10016 (212) 686-5200

APPENDIX B

Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services.
March 10, 1981

Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services
March 10, 1981

It is the position of the Governors of the United States Postal Service that the public interest is best served by reasonably stable, and therefore reasonably predictable, postage rates, which are to the maximum extent possible constant for basic periods. Accordingly, we must take issue with the Recommended Decision of the Postal Rate Commission.

Therefore, pursuant to the Postal Reorganization Act, the Governors hereby, under protest, allow the Postal Rate Commission's February 19, 1981, Recommended Decision captioned "Postal Rate and Fee Changes, 1980, Docket No. R80-1," (as changed by the Commission's "Errata Notice" of February 27, 1981, and its "Further Notice of Errata" of March 6, 1981), to take effect except as noted below. Except as noted below, the associated classification changes are likewise allowed to take effect. The Recommended Decision is returned to the Commission for reconsideration and a further recommended decision.

The Postal Service's Board of Governors has concurrently determined that the schedule of rates and fees and classification schedule changes hereby allowed under protest, and the rates shown in Appendix Three to this decision, will take effect at 12:01 A.M. on March 22, 1981, except as otherwise specifically stated.

Summary

The Governors allow, under protest, the recommended rates and fees of the Postal Rate Commission to take effect on March 22 because of the Postal Service's urgent need for revenues. In further discharging their duty to assure the fiscal integrity and stability of the Postal Service, however, the Governors voted unanimously to protest the

recommendation of the Postal Rate Commission. That recommendation would establish rates so unrealistically low as to require the early necessity of a further rate proceeding. The Commission's recommendation will lead to unnecessary additional costs because the Postal Service may have to borrow money at high interest rates to meet payroll and other operating costs. Moreover, the revenue disallowances by the Commission promise continual ratemaking proceedings which will destroy the stability of postal rates so carefully built over the past several years to encourage significant increases in volume in an increasingly competitive market situation.

We return this recommended decision to forestall the need to begin another rate case right away, and to give the Postal Rate Commission the opportunity to avoid these problems and to render a decision that we, the Governors, can approve as consistent with our statutory obligations. After ten months of detailed proceedings, the Commission is in a position to act promptly. It is imperative that it do so.

The 18 cent stamp is a recommendation for fiscal irresponsibility in postal matters; it is a recommendation for constant rate changing; and it is a recommendation for higher than necessary postal rates in the future.

Never before have the Governors of the Postal Service found it necessary in a general rate case to protest under the Postal Reorganization Act a recommended decision of the Postal Rate Commission. While the Governors have expressed disagreement with some aspects of the Commission's recommendations in the four prior rate cases, we approved them in each case. The present recommended decision is quite a different matter. The rates the Commission proposes would have such a damaging impact on Postal Service revenues, and on the ability of the Governors to fulfill their statutory responsibility to provide "honest, efficient, and economical management," that approval by

the Governors would be fiscally irresponsible and inconsistent with our legal responsibility under the Act "to represent the public interest generally."

We recognize that the 18 cent rate may have popular appeal. But the real significance of the Commission's recommended decision is not an 18 cent First-Class stamp versus a 20 cent one. The real significance is this: the Commission's decision would result in a failure to break even in the test year and would mandate a further increase next year. To achieve a lower stamp today, the Commission has chosen to ignore more than $1 billion in revenue needs that will have to be collected in the near future. This is not cost-cutting; it is make-believe. As every American family knows only too well, costs and obligations that are ignored do not go away.

General postal rates have not risen since May 1978. While mail prices in the United States have remained constant, the general inflation rate has gone up nearly 40 percent. These rates are a true bargain, particularly as compared to rates in other industrialized countries. In France a stamp costs 30 cents, and in the Federal Republic of Germany, 29 cents.

Against this demonstrated record of price stability, we cannot in good conscience approve the patently insufficient postal revenues recommended by the Commission. These revenues would not allow the Postal Service to attain the break-even standard, much less maintain any reasonable period of rate stability. The Postal Service will be losing money the first quarter these recommended rates are in effect. If we were to approve the Commission's rates, postal management would be thrown into an endless morass of borrowing and filing for higher rates, with interminable, overlapping rate proceedings. This would be a catastrophic blow to efficient postal management and unnecessarily expensive for American mailers.

Covering postal obligations in a responsible manner—rather than ignoring them—is only one part of the formula for prudent and efficient postal management. Another is a vigorous program of cost-cutting which the Governors embrace in no uncertain terms. The Postal Service during recent years has shown impressive productivity gains—34 percent over the last ten years. To assure that the Postal Service in the future will continue to be as successful in cutting costs and maximizing postal efficiency, the Governors are today directing the Postmaster General to develop an aggressive plan with specific goals and proposals to keep postal costs as low as possible. As a part of this plan, consideration should be given to possible reductions or postponements in capital expenditures, further increases in efficiencies, and any other reductions that can be effected.

In sum, we return this recommended decision for reconsideration because:

- Its adoption would result in the need for a further rate increase shortly thereafter. Adoption of the 20 cent stamp requested by the Postal Service, on the other hand, would assure a substantial period of rate stability.

- The 18 cent First-Class recommendation is an affront to economic reality. Since the last general rate increase, inflation has risen nearly 40 percent; an 18 cent First-Class stamp represents a 20 percent price increase. Because of significant productivity gains, the Postal Service can keep mail price increases well below the inflation rate, but not at one half of the inflation rate. This is especially true since the Postal Service's major costs—manpower and transportation (with accelerating fuel costs)—have risen dramatically in recent years. The 20 cent stamp suggested by the Postal Service would still be well below the general rates of inflation.

- The insufficient revenues that would result from the recommended decision would place the Postal Service in a dangerously low cash position before the end of FY 1982.

- Under the Commission's recommendation, the Postal Service will have to consider borrowing at extraordinarily high interest rates; this, in turn, creates unnecessary additional expenses. The Postal Service's strong cash position in recent years has allowed it to make capital improvements without borrowing. It has thus been able to pass on to its customers the benefits of increased productivity gained by use of new plant and equipment without passing on the cost of debt service.

- Acceptance of the Commission's decision would lead to an annual rate case filing by the Postal Service and continual regulatory proceedings at a cost to mailers and taxpayers of tens of millions of dollars.

- Finally, adoption of the recommended decision, and the principles underlying it, would render the Postal Service unable to manage postal affairs as was contemplated in the Postal Reorganization Act. The Postal Service would remain fully responsible for management under the law, but its ability to make many basic management decisions would be removed.

We state these blunt realities as forthrightly as we can, for the American people deserve a candid picture of the situation. The Postal Rate Commission must face these realities as it considers our protest.

Statement of Explanation and Justification

It has been nearly three years since the last general increase in postal rates. During this period of rate stability, the Postal Service has operated as intended under the

Postal Reorganization Act. Postal rates and fees, in the words of the Act, have provided sufficient revenues so that the total income and appropriations to the Postal Service equal as nearly as practicable the total costs of the Postal Service. Mail volume, possibly the best index of how useful the postal system is to the nation, has broken all records. In large measure, the recent economic success of the Postal Service results from the deliberate judgment of the Board of Governors in determining the timing of general rate increases in a protracted period of national inflation.

The recommended decision of the Postal Rate Commission, if unchanged, would severely undermine the Postal Service's economic vitality in three important respects. First, the recommended decision provides inadequate revenues. The rates proposed simply do not allow the Postal Service to cover its costs and thus to remain self-sufficient as required by law. Second, the principles the Commission espouses will lead to a radical increase in the frequency of general rate adjustments, impairing the ability of mailers to plan on stable postal rates. Third, in its adherence to the service-related costing concept, the recommended decision conflicts with the establishment of prices at compensatory rates that will encourage mail volume growth.

The Commission's unprecedented rejection of major elements of the Postal Service's revenue requirement creates a fundamental issue that must be resolved in the further review of this rate case. The Postal Reorganization Act entrusts the management of the Postal Service to the Board of Governors. The estimate of the revenues necessary to operate the Postal Service is a management function, over which the Postal Rate Commission has no jurisdiction. In this sense the Postal Rate Commission is unlike the rate-making bodies in more traditional public utility regulatory systems, in which revenue requirements are scrutinized and adjusted. One reason for this difference is that the Postal Service, unlike a public utility, does not have stockholders

and does not seek to make a profit. Higher revenues do not in any way "benefit" the Postal Service or any private interest, but sufficient revenues are necessary if the nation's postal system is to operate efficiently and properly. It is the responsibility of the Board of Governors of the Postal Service, whose public members are "chosen to represent the public interest generally," to determine what will constitute sufficient revenues.

The Commission's recommended decision would jeopardize the long-term stability of the Postal Service for the illusory short-term benefit of lower postal rates. In fact, even in the short term, the Commission's recommendation simply would not yield enough revenues to cover postal costs. This shortfall would lead to a rate filing as soon as possible by the Postal Service, another protracted rate proceeding, and another period of uncertainty for business mailers and the general public.

Over the long term, more frequent general rate changes and the unrealistic assignment of costs to particular categories of mail work against the continuing increases in volume that are essential if postal rates are to be kept at acceptable levels. The Commission's adoption of service-related costing in its recommended decision is a serious misapportionment of costs. It is a strait jacket that ties the hands of postal management in competing with other carriers. Under the Postal Reorganization Act, it is clear that the Congress intended the Postal Service to become virtually self-sufficient financially. The practical effect of the service-related costing methodology is to postpone this day indefinitely because it is totally indifferent to economic reality in the marketplace. Its application will result in postage rates that will reduce current mail volume and inhibit the attraction of new volume because it results in rates that do not recognize value of service.

The process through which the Commission arrived at its inadequate rate recommendation is seriously flawed in two

areas: the treatment of the Postal Service's revenue requirement and the assignment of so-called "service-related" costs. In singling out these issues for particular attention, we by no means suggest that they are the only points that should be scrutinized in further reviews of the recommended decision. Rather, they are the most significant in their sweeping implications for both this and future rate proceedings.

Revenue Requirement

The Commission's insufficient rate recommendation results from its reduction of the Postal Service's revenue requirement for the test year by about $1 billion. The major elements of the reduction include the patently unlawful disallowance of any amount for the recovery of prior years' losses; the restriction of the statutory "reasonable provision for contingencies" to an unreasonable 1.8 percent; the unrealistic assumption of a 10 percent discount factor in calculating workers' compensation costs, to be paid out over the next decade or more; the cut in the expense shown for the Postal Service's obligation to the Civil Service Retirement Fund, in contravention of sound accounting practice; and the application of an unproven "productivity" factor without any support in the record for it.

The revenue requirement filed by the Postal Service in this case was conservative. Considerable attention was given by the Board, over a period of several months prior to authorizing the filing, to establishing the minimum level of revenue required to operate the Postal Service in the manner prescribed under the statute. The Board worked to hold the level of the First-Class rate more than two cents below what it would have been had the rate tracked the Consumer Price Index. It deliberately used key factors in calculating the revenue requirement that were below the levels used with approval by the Commission and the courts in previous cases. If previously

approved patterns had been followed, the revenue requirement would have been more than $500 million higher than the amount proposed.

Prior Years' Losses. The Commission eliminated the $449 million provision for the recovery of prior years' losses, primarily on the ground that a part of the total amount of accumulated losses was

> the direct consequence of a determination made by the Governors not to file this case until April 21, 1980. . . . Because this action contravenes the § 3621 break-even requirement, it is not in accord with the honest, efficient and economical standard of management prescribed for the Postal Service. Thus, for this proceeding, we are disallowing prior year losses from the Postal Service's revenue requirement.

Thus the Commission has determined to discipline the Postal Service for the Board's decision to delay a general rate filing until last April. But nothing in the Postal Reorganization Act empowers the Commission to act as disciplinarian. It is absurd to declare that a 20 cent stamp would be appropriate if we had asked for it several months earlier, but that only 18 cents is warranted now. Ultimately the punitive disallowance is not inflicted on the Board or the Postal Service, but rather on future ratepayers or taxpayers, because there simply is no other source of funds to defray the costs in question. Refusal to recognize these costs does not make them go away; it only shifts the burden of them to the future.

Decisions on the timing of Postal Service rate filings are central to the management of the Postal Service—management for which the Board of Governors, not the Postal Rate Commission, is responsible under the Postal Reorganization Act. As pointed out in the "Decision of the Governors" in the first general rate case (Commission Docket

No. R71-1), the honesty, efficiency, and economy of postal management are matters

> committed to the supervision of the Board of Governors. They are "what management is all about." They are of continuing concern to us, as the public's representatives on the Board. But they should not become involved in proceedings before the Commission.

It is plainly erroneous to suggest that the Postal Reorganization Act's mandate for practicable cost/revenue equilibrium (39 U.S.C. § 3621) requires a rate filing whenever projections of future costs and revenues forecast a deficit for a fiscal year. It certainly does not violate the statute to space rate filings so that the net financial gain in one year or an eighteen month period is roughly balanced by the net loss of the next. In fact, the rate stability resulting from this approach (as recent record mail volumes attest) fosters the "development of postal services of the kind and quality adapted to the needs of the United States," as envisioned by the same Section 3621. Moreover, while Section 3621 is silent on the timing of rate filings, Section 3622 is explicit on the subject: a filing is to be made when the Postal Service determines that rate changes would be in the public interest and in accord with the policies of the Act. Neither section assigns any role in the matter to the Postal Rate Commission.

Provision for Contingencies. The Commission removed $263 million from the Postal Service's revenue requirement by reducing the statutory "reasonable provision for contingencies" from 3 percent to 1.8 percent. As Commissioner Duffy's dissent explains, the Commission is able to call this a 2.5 percent contingency provision by improperly including in it $144.1 million for increases in cost-of-living adjustments. This amount is not a contingency, it is an

actual cost that should have been added to total accrued costs.

The Commission's reduction is wholly arbitrary. In the last rate case, a 4 percent contingency provision was specifically upheld by the United States Court of Appeals for the District of Columbia Circuit. Nothing in today's economic outlook justifies greater confidence in the accuracy of economic forecasts. Moreover, a sharp reduction in Congressional appropriations to the Postal Service seems likely. In this connection, the Commission's stated refusal to "speculate on the results of future legislative initiatives" is unconvincing: informed speculation is the essence of estimating the provision for contingencies. Indeed, in the light of recent developments regarding Postal Service appropriations, the 3 percent provision for contingencies included in the Postal Service's filing appears minimal; the 1.8 percent sanctioned by the Commission is recklessly inadequate.

Discount Rate. The Commission cut $327 million from the revenue requirement by applying a 10 percent discount factor to accrued workers' compensation liabilities rather than the 7.5 percent used by the Postal Service to reflect "the assumed rate of return . . . in the test year on the funds underlying the workers' compensation liability." Clearly the test year is not the appropriate period over which to estimate earnings rates on funds that have been accrued to pay benefits over the next decade or more. This change is unrealistic and without support in the record. No witness advocated a rate in excess of 8.5 percent. The Commission's 10 percent factor suggests an assumption of continuing "double digit" inflation for years to come, even though the Commission obviously has not forecast Postal Service costs on this basis.

Civil Service Retirement Fund. The Commission struck $123 million from the revenue requirement to reflect its perception of an overestimate in the Postal Service's test year obligations to the Civil Service Retirement Fund that are expected to accrue as a result of the anticipated inclusion of an accumulated cost-of-living adjustments in base salaries. Proper accounting principles require that a liability of this kind be recognized at the time it is incurred; and it is consistent with other cost assumptions that the Commission has adopted in this case to calculate that this liability will be incurred entirely within the test year.

Productivity. The Commission also removed $143 million from the revenue requirement as a consequence of its decision to use a totally new productivity measurement technique. This technique was put forward by the Commission after the close of the evidentiary record; the Commission refused requests of several parties (including the Postal Service) to reopen the record and provide a sponsoring witness who could be questioned on the inputs, assumptions, and techniques used in the models. The Commission's reduction of the $143 million is not supported by substantial evidence in the record.

Service-Related Costs

The Commission's recommendation assigns over $1.8 billion of unattributable postal costs to certain preferred categories of mail on the ground that these costs are "service-related." The assignment depends on the assumption that these costs would not have been incurred at all if the Postal Service delivered mail only three days a week instead of six. It further assumes that the only reason the Postal Service delivers six days a week is to benefit the senders of preferential mail. The Commission asserts that but for the priority treatment to be accorded First-Class Mail, red-tag mail, etc., the Postal Service would adopt a three-day-a-week delivery schedule. The assumption is patently unrealistic.

"Service-related costs" were used for the first time in the last rate case, Docket No. R77-1, in what then appeared to be a reasonable attempt to conform to the Court of Appeals' strongly expressed emphasis in *NAGCP I* on assignment and attribution of costs.[1] Whatever the justification at that time, substantial increases in mail volumes since then call into question the hypothetical assumptions on which the theory was based. And recent costing studies have lessened whatever need there formerly was to strain for concepts that might reduce the apparent scope of "judgment" in allocating postal costs. Accordingly, by the time the present case was filed in April 1980, the Board of Governors was able to make it clear that it regarded the concept as no longer acceptable.

No one who is informed on postal matters can seriously suppose that the Postal Service would make regular deliveries only three days a week if a few paragraphs concerning priorities were cut out of some internal operating instructions. Yet, without precisely this supposition, the whole "service-related cost" methodology is meaningless. Reasoned decisionmaking cannot tolerate the assignment of over $1.8 billion on the basis of such a transparent fiction.

In this connection, we reiterate our statement in our May 19, 1978, Decision in the last general rate case (R77-1) concerning the importance of pricing principles that give due weight to the non-costing ratemaking factors in the Act:

> In referring to our previous expressions of approval of much of the Commission's earlier opinions, we in-

---

[1] The court in *NAGCP I* endorsed no particular methodology for assigning and attributing costs. The same Court in *NAGCP III* expressed concern that the decision in *NAGCP I* not be interpreted to require assignment and attribution of costs for their own sake. Indeed, the concurring opinion in *NAGCP I* highlighted this potential problem.

clude reference to the Commission's development of costing and pricing principles in the second and third rate cases. To a substantial extent, these principles have been drawn in question by the Decision of the U.S. Court of Appeals in *National Association of Greeting Card Publishers* v. *United States Postal Service,* 569 F.2d 570, (D.C. Cir., 1976). In this connection, we strongly endorse the Commission's views on the bearing of the Court's Decision in *NAGCP I* on this proceeding; we agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

Rate Schedule Anomalies

The Commission's failure to consider the requirements of simplicity and reasonable rate relationships (39 U.S.C. § 3622(b)(7)), coupled with the combined effects of the Commission's dramatic reduction in the Postal Service's revenue requirement and the assignment of service-related costs, have led to a number of serious anomalies in the rate schedule recommended by the Commission, which should be rectified upon reconsideration. For example:

- The second and additional ounces for First-Class presorted mail under the recommended schedule will require more postage than the first ounce. Each one and one-half ounce letter presorted to carrier route will require 31 cents postage. If each of the one and one-half ounce letters were separately enveloped as two three-fourth ounce letters presorted to the same carrier route address, the postage would be 28 cents for two letters. Obviously, the cost of handling two letters is greater than handling one letter.

• Advertising circulars at third-class bulk rates will often be lower under the recommended schedule than regular second-class rates for lightweight publications such as magazines. For example, the unit postage for a two ounce newsletter presorted to carrier route would be 6.4 cents as third class and 6.7 cents as second class. The difference increases if the publication has advertising.

• It would be less expensive under the Commission's recommendation to send 10,000 catalogs for local delivery, weighing between 14 and 16 ounces, *unsorted* at the bound printed matter rates than it would be to send them *presorted* to 5-digit destinations at the third-class bulk rates. Yet, the cost is obviously greater to handle unsorted mail than mail which is presorted.

• Many bound printed matter (with advertising) rates will be lower than rates for special-rate fourth class books (without advertising). For example, an individual mailing of a 1½-2 pound catalog could be mailed for 31-82 cents within a 1,400 mile radius. It would cost 86 cents to mail a book of the same weight.

• It would be less expensive to mail a 36-pound nonmachinable parcel than a parcel of lower weight. A mailer could save 19 cents by making heavier a 35 pound parcel to be mailed across the country.

Further Actions

Third-Class Bulk Mail

The Governors cannot place into effect in their entirety the rates recommended by the Commission for third-class bulk mail because the Commission has made proper consideration of those rates impossible. The Commission, on its own initiative, has incorporated a classification change for third-class bulk mail, and the rates which it recommends are predicated on the assumption that the classifi-

cation change would be approved. The Commission neglected to recommend an alternative set of rates, should the Governors not approve the classification change. Except for the unusual instance wherein the Governors modify a Commission recommendation, the Postal Reorganization Act requires that the Governors and the Commission come to agreement upon classification changes before they are made a part of the permanent schedules. Implicit in this requirement is the necessity that we exercise our independent judgment on the Commission's classification proposals.

By recommending only those rates which assume adoption of the classification change—a change which was not at issue in the rate proceeding in its present form—the Commission has acted to negate our independent assessment of the classification change. The revenues needed from those rates are, in effect, held hostage to the classification change because new rates which do not pre-suppose the classification change have not been presented. The Commission does not have authority to negate the classification review authority provided to the Governors in this manner by including a classification recommendation within a rate case and recommending only one set of rates that are coupled with the change.

Several of the classification changes included in the Commission's Recommended Decision are acceptable to us. But we reject the Commission's recommended classification change dividing third-class bulk mail into light-weight and heavy-weight categories, and return it to the Commission for further consideration. Since the Commission has not made a recommendation within the statutory ten-month period that complies with the statutory scheme providing for our approval, the Board of Governors is placing into effect temporary rates for third-class bulk rate mail pursuant to Section 3641. These temporary rates appear at Appendix Three. In no weight category do these rates ex-

ceed either those suggested by the Postal Service or those recommended by the Commission. This action will treat fairly an important segment of Postal Service customers who, because of the Commission's classification recommendation (which in the form recommended was untested on the record), would otherwise have been burdened with rate increases ranging up to 50 percent.

Red-Tag

The Governors are taking no action at this time with regard to the rates recommended by the Commission for expedited second-class, or red-tag, mail. The August 15, 1980, Decision in Docket No. MC79-3 stated that the Board of Governors had fixed the effective date for the Domestic Mail Classification Schedule changes establishing a separate subclass for red-tag mail at June 1, 1981. Therefore, the subclass, to which the rates recommended by the Commission would apply, is not now in existence.

Here again, the Commission has failed to recommend rates for the existing classification. It has recommended two levels of rates applicable after the new subclasses become effective. Because they are the less disruptive of the two sets, the *regular* rates are being placed into effect for all regular rate second-class publications.

Estimated Anticipated Revenue

Estimated net income for the test year (March 21, 1981-March 20, 1982) at the rates recommended by the Commission is a loss exceeding $400 million. This estimate assumes that the Postal Service will receive the full amount of public service appropriations for both FYs 1981 and 1982, and that no further unforeseen events occur. Should the current recommendations of the Administration for reductions be accepted by the Congress, the estimated test year loss would increase to three quarters of a billion dollars.

Phasing of Rates

In phasing rates, the Commission has again used the methodology that we rejected in Docket No. MC78-2. As stated in our Decision, "consistent application of the Act's phasing provisions requires that . . . nonprofit rates be phased in accordance with the statute and prior practice." Thus we have recomputed the phasing tables contained in the Commission's recommendations. The recalculation is totally within the power of the Governors since, as has been stated in every major rate decision and in several classification decisions, the power to phase preferred rates was conferred by the Congress on the Governors and not on the Postal Rate Commission. One of the advantages of the impartial application of a consistent phasing formula by the Governors is illustrated in the Commission's phasing schedules for second-class mail, where different phasing methodologies have been applied in the same schedule, presumably to encourage worksharing. As stated in our decision in Docket No. MC78-2, and as the Postal Service argued during the Court of Appeals litigation of that decision,[2] phasing is a "value-neutral" operation which was not intended to influence mailer decisionmaking. The phased rate tables have been recalculated to retain that impartiality.

The standard phasing methodology, which has been consistently applied in past cases, is based on the unrounded rate at the previous step before the rate change.

In this case, we have therefore used the unrounded step-8 rate from Docket No. R77-1 (MC78-2 for third-class) as the base rate in our calculations. Since the book/catalog and ordinary matter categories have been merged, it was necessary to establish a combined step 8 rate under the existing schedule to use as a base for the pound rate. The

---

[2] *National Easter Seal Society v. USPS*, Docket No. 80-1491 (D.C. Cir.). This case has not yet been decided.

development of the combined unrounded step 8 pound rate is described in the attached "Annex 1."

ORDER

Pursuant to the foregoing, the rates and fees and associated Domestic Mail Classification Schedule changes set forth in Schedules A through F of Appendix One, as appended hereto and incorporated herein, are ordered to be placed into effect.

Pursuant to the foregoing, the following provisions or parts of provisions of Schedule F (Recommended Changes in the Domestic Mail Classification Schedule) of Appendix One of the Recommended Decision of the Postal Rate Commission dated February 19, 1981, are not adopted:

100.042 a. i.
100.042 a. ii.
200.0202
200.021
200.0218
200.046
200.047
200.093 (part)
400.01 e.
400.0203

The Postal Rate Commission's recommendation for a classification change which would divide regular bulk third-class mail into light-weight and heavy-weight rate categories, which is reflected in Schedule C (Third-Class Mail) of Appendix One of the Commission's Recommended Decision dated February 19, 1981, is not adopted.

The recommendation to include ZIP-Code numbers identifying Bulk Mail service areas, as reflected in Section 400.0204 of Schedule F, Appendix One of the Commission's Recommended Decision dated February 19, 1981, is not

adopted, since it is clearly beyond the proper scope of the Domestic Mail Classification Schedule.

In accordance with 39 U.S.C. § 3626, separate rate schedules for the classes of mail and kinds of mailers identified in Section 3626 are hereby adopted, as set forth in Schedules 1 through 6 of Appendix Two as appended hereto and incorporated herein, and the rates becoming effective shall be those set forth in the "Year 9" column under the heading of "Phased Rates."

The Postal Service will place into effect temporary rates for third-class bulk mail, as set forth in Appendix Three as appended hereto, at 12:01 A.M. on March 22, 1981, in accordance with Resolution No. 80-6 of the Board of Governors, a copy of which is attached.

The Postal Service will place all other parts of this Decision into effect on 12:01 A.M. on March 22, 1981, in accordance with Resolution Nos. 80-4 and 80-5 of the Board of Governors, copies of which are attached.

By The Governors
/s/ Robert L. Hardesty
Chairman

Annex 1

Development of the Combined Base Rate for the Nonprofit Third-Class Bulk Pound Rate

Two separate phasing sequences now exist for third-class pound-rate matter: one for ordinary matter with a full rate of 34 cents and one for books and catalogs with a full rate of 29 cents per pound. These phasing sequences were combined and then used to develop the correct phasing sequence for pound-rate matter with a full rate of 23.4 cents per pound. The development of this phasing sequence is detailed below:

1. Using each of the existing phasing sequences, recommended rates as a proportion of the full rate were determined for step 8. The results were 0.544439 for ordinary matter and 0.536833 for books and catalogs.

2. The percentage (in pounds) of third-class bulk nonprofit mail at each of the pound rates was calculated using the data in the Allen Workpapers (USPS-T-10 billing determinants, page G-4). Those percentages indicate 42.1933 percent of the pounds are ordinary matter and 57.8067 percent of the pounds are books and catalogs.

3. The proportions at the step 8 rates (from 1. above) were averaged using the percentage of pounds in each rate category (from 2. above). The result was a single number representing the proportion of the full pound rate appropriate for combined circular and book/catalog pound matter at Step 8. This proportion was 0.540108.

4. The result of 3. above (0.540108) was multiplied by the new full rate for pound-rate material to determine the appropriate unrounded rate applicable to Step 8. The result is 12.638527. ($0.540108 \times 23.4 = 12.638527$).

5. Using the Step 8 unrounded rate of 12.638527 and the new full rate of 23.4 cents, the normal phasing procedure was applied to develop the unrounded pound rates at each step. These unrounded rates were then rounded to the nearest tenth of a cent.

RESOLUTION OF THE BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE

RESOLUTION No. 80-4

Effective Date of New Rates of Postage and Fees for Postal Services

RESOLVED:

Pursuant to Section 3625(f) of Title 39, United States Code, the Board of Governors determines that the rates of postage and fees for postal services that were ordered to be placed into effect by the Decision of the Governors dated March 10, 1981, shall become effective at 12:01 A.M. on March 22, 1981.

The foregoing Resolution was adopted by the Board of Governors on March 10, 1981.

/s/ LOUIS A. COX
Secretary

RESOLUTION OF THE BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE

RESOLUTION No. 80-5

Effective Date for Changes in the Domestic Mail Classification Schedule

RESOLVED:

Pursuant to Section 3625(f) of Title 39, United States Code, the Board of Governors determines that the changes in the Domestic Mail Classification Schedule that were ordered to be placed into effect by the Decision of the Governors dated March 10, 1981, shall become effective at 12:01 A.M. on March 22, 1981.

The foregoing Resolution was adopted by the Board of Governors on March 10, 1981.

/s/ Louis A. Cox
Secretary

RESOLUTION OF THE BOARD OF GOVERNORS OF THE UNITED STATES POSTAL SERVICE

RESOLUTION No. 80-6

Effective Date of Temporary Rates of Postage

RESOLVED:

Pursuant to Section 3641(a) of Title 39, United States Code, the Board of Governors determines that the rates of postage for third-class bulk mail appended to the Decision of the Governors dated March 10, 1981, as Appendix Three, shall become effective on a temporary basis at 12:01 A.M. on March 22, 1981.

The foregoing Resolution was adopted by the Board of Governors on March 10, 1981.

/s/ LOUIS A. COX
Secretary

RATES AND FEES
AND
CHANGES IN DOMESTIC
MAIL CLASSIFICATION SCHEDULE

Appendix One

TABLE OF CONTENTS

Page

Schedule A-1
First-class and Business Reply

Schedule A-2
Priority Mail

Schedule A-3
Express Mail: Same Day Airport Service

Schedule A-4
Express Mail: Next Day Airport Service
Post Office-to-Post Office

Schedule A-5
Express Mail: Next Day Service
Post Office-to-Addressee

Schedule A-6
Express Mail: Custom Designed Service

Schedule B-1
Second-Class Mail: In-County and Transient

Schedule B-2
Second-Class Mail: Publications of Authorized Nonprofit Organizations, Outside County

Schedule B-3
Second-Class Mail: Classroom Publications, Outside County

Schedule B-4
Second-Class Mail: Regular Rate Publications, Outside County

Schedule C
Third-Class Mail

Schedule D-1
Fourth-Class Mail: Special and Library

Table of Contents (continued)

Page

Schedule D-2
Fourth-Class Mail: Single-Piece Bound

Schedule D-3
Fourth-Class Mail: Bulk Bound Printed Matter

Schedule D-4
Fourth-Class Mail: Parcel Post

Schedule E-1
Special Services: Address Corrections

Schedule E-2
Certificates of Mailing

Schedule E-3
Special Services: Certified Mail

Schedule E-4
Special Services: Collect on Delivery

Schedule E-5
Special Services: Dead Letter Return

Schedule E-6
Special Services: Insured Mail

Schedule E-7
Special Services: Lockbox/Caller Service

Schedule E-8
Special Services: Meter Setting on Site

Schedule E-9
Special Services: Money Orders

Schedule E-10
Special Services: Parcel Airlift

Schedule E-11
Special Services: Permit Imprint

Schedule E-12
Special Services: Registered Mail

Table of Contents (continued)

Page

Schedule E-13
Special Services: Restricted Delivery

Schedule E-14
Special Services: Return Receipts

Schedule E-15
Special Services: Second-Class Applications

Schedule E-16
Special Services: Special Delivery

Schedule E-17
Special Services: Special Handling

Schedule E-18
Special Services: Stamped Envelopes

Schedule E-19
Special Services: Zip Coding of Mailing Lists

Schedule E-20
Correction of Mailing Lists

Schedule E-21
Address Changes for Election Boards and Registration Commissions

Schedule F
Recommended Changes in the Domestic Mail Classification Schedule

SCHEDULE A-1
First Class and Business Reply

Mail Type	Postage Rate Unit	RATE		
			Presorted[1] (cents)	
		Regular (cents)	5-digit	carrier route
First Class:				
Letters	First ounce	18	15	14
	Each additional ounce	17[2]	17	17
Cards	Piece	12	11	10
Business Reply[3]	With advance deposit account	5		
	Without advance deposit account	18		
Nonstandard Surcharge[4]		9		

[1] Presorted first-class mail must be presented in a single mailing of 500 or more pieces properly prepared and presorted. The higher presort rate applies only to each piece of a group of ten or more pieces destined for the same five-digit ZIP Code or each piece of a group of fifty or more pieces destined for the same three-digit ZIP Code. The lower presort rate applies only to mail presorted to carrier route, with a minimum of 10 pieces per route. A mailing fee of $40 must be paid once each calendar year at each office of mailing by any person who mails presorted first-class mail.

[2] Rate applies through 12 ounces. Heavier pieces are subject to priority mail rates.

[3] Rates are applied on a per-piece basis in addition to regular postage. A fee of $40 must be paid once each calendar year for each business-reply permit. An accounting charge must be paid once each calendar year for each business-reply advance deposit account.

[4] Applies to the first ounce only.

SCHEDULE A-2
(dollars)

Weight (not) Exceeding (Pounds)	PRIORITY MAIL[1]					
	Z 1. 2. 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8
1	2.22[2]	2.22[2]	2.22[2]	2.22[2]	2.29	2.42
1.5	2.22[2]	2.27	2.41	2.57	2.73	2.93
2	2.40	2.56	2.74	2.95	3.16	3.43
2.5	2.54	2.86	3.07	3.34	3.60	3.93
3	2.39	3.12	3.40	3.72	4.04	4.43
3.5	3.13	3.41	3.73	4.10	4.47	4.93
4	3.38	3.69	4.06	4.49	4.91	5.44
4.5	3.62	3.96	4.39	4.87	5.34	5.94
5	3.87	4.26	4.72	5.25	5.75	6.44
6	4.35	4.83	5.39	6.02	6.65	7.44
7	4.84	5.40	6.05	6.79	7.52	8.45
8	5.33	5.96	6.71	7.56	8.40	9.45
9	5.82	6.53	7.37	8.32	9.27	10.46
10	6.31	7.10	8.03	9.09	10.14	11.46
11	6.80	7.67	8.69	9.86	11.01	12.46
12	7.29	8.24	9.35	10.62	11.88	13.47
13	7.78	8.30	10.01	11.39	12.76	14.47
14	8.27	9.37	10.67	12.16	13.63	15.48
15	8.76	9.94	11.34	12.93	14.50	16.48
16	9.24	10.51	12.00	13.69	15.37	17.48
17	9.73	11.08	12.66	14.46	16.24	18.49
18	10.22	11.64	13.32	15.23	17.12	19.49
19	10.71	12.21	13.98	15.99	17.99	20.50
20	11.20	12.78	14.64	16.76	18.86	21.50
21	11.69	13.35	15.30	17.53	19.73	22.50
22	12.18	13.92	15.96	18.29	20.60	23.51
23	12.67	14.48	16.62	19.06	21.48	24.51
24	13.16	15.05	17.28	19.83	22.35	25.52
25	13.63	15.62	17.95	20.60	23.22	26.52
26	14.13	16.19	18.61	21.36	24.09	27.52
27	14.62	16.76	19.27	22.13	24.96	28.53
28	15.11	17.32	19.93	22.90	25.34	29.53
29	13.60	17.39	20.59	23.66	25.71	30.54
30	16.09	18.46	21.25	24.43	27.38	31.54
31	16.58	19.03	21.91	25.20	28.45	32.54
32	17.07	19.60	22.57	25.96	29.32	33.55
33	17.56	20.16	23.22	25.73	30.20	34.55
34	18.05	20.73	23.89	27.50	31.07	35.56
35	18.34	21.30	24.56	28.27	31.94	36.56
36	19.02	21.37	25.22	29.03	32.31	37.56
37	19.51	22.44	25.88	29.30	33.68	38.57
38	20.00	23.00	26.54	30.57	34.56	39.57
39	20.49	23.57	27.20	31.33	35.43	40.58

SCHEDULE A-2—Continued
(dollars)

Weight (not) Exceeding (Pounds)	PRIORITY MAIL [1] Z 1. 2. 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8
40	20.98	24.14	27.86	32.10	36.30	41.58
41	21.47	24.71	28.52	32.87	37.17	42.58
42	21 96	25.28	29.18	33.63	38.04	43.59
43	22.45	25.84	29.84	34.40	38.92	44.59
44	22.94	26.41	30.50	35.17	39.79	45.60
45	23.43	26.98	31.17	35.94	40.66	46.00
46	23.91	27.55	31.83	36.70	41.53	47.60
47	24.40	28.12	32.49	37.47	42.40	48.61
48	24.89	28.68	33.15	38.24	43.28	49.61
49	25.38	29.25	33.31	39.00	44.15	50.62
50	25.87	29.82	34.47	39.77	45.02	51.62
51	26.36	30.39	35.13	40.54	45.89	52.62
52	26.85	30.96	35.79	41.30	46.76	53.63
53	27.34	31.52	36.45	42.07	47.64	54.63
54	27.83	32.09	37.11	42.84	48.51	55.64
55	28.32	32.66	37.78	43.61	49.38	56.64
56	28.80	33.23	38.44	44.37	50.25	57.64
57	29.29	33.80	39.10	45.14	51.12	58.65
58	29.78	34.36	39.76	45.91	52.00	59.65
59	30.27	34.93	40.42	46.67	52.87	60.66
60	30.76	35.50	41.08	47.44	53.74	61.66
61	31.25	36.07	41.74	48.21	54.61	62.66
62	31.74	36.64	42.40	48.97	55.48	63.67
63	32.23	37.20	43.06	49.74	56.36	64.67
64	32.72	37.77	43.72	50.51	57.23	65.68
65	33.21	38.34	44.39	51.28	58.10	66.68
66	33.69	38.91	45.05	53.04	58.97	67.68
67	34.18	39.48	45.71	52.81	59.84	68.69
68	34.67	40.04	46.37	53.58	60.72	69.69
69	35.16	40.61	47.03	54.34	61.59	70.70
70	35.65	41.18	47.69	55.11	62.46	71.70
Per Piece	$1.42	$1.42	$1.42	$1.42	$1.42	$1.42
Per Pound	48.9¢	56.8¢	66.1¢	76.7¢	87.2¢	100.4¢

[1] Exception: Parcels weighing less than 15 pounds, measuring over 84 inches but not exceeding 100 inches in length and girth combined, are chargeable with a minimum rate equal to that for a 15-pound parcel for the one to which addressed.

[2] Based on first-class postage for 13 ounces.

SCHEDULE A-3

Express Mail

SAME DAY AIRPORT SERVICE

(dollars)

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
1	5.60	5.65	5.70	5.80	5.90	6.00	6.15	6.25
2	6.05	6.15	6.30	6.50	6.70	6.90	7.20	7.45
3	6.55	6.70	6.90	7.15	7.50	7.80	8.25	8.50
4	7.00	7.20	7.45	7.85	8.30	8.70	9.30	9.75
5	7.50	7.75	8.05	8.55	9.10	9.50	10.35	10.95
6	7.95	8.25	8.65	9.20	9.35	10.50	11.40	12.10
7	8.45	8.60	9.25	9.90	10.65	11.40	12.45	13.30
8	8.90	9.30	9.85	10.50	11.45	12.30	13.50	14.45
9	9.40	9.85	10.45	11.30	12.25	13.20	14.55	15.60
10	9.85	10.35	11.00	11.95	13.05	14.10	15.50	15.80
11	10.35	10.90	11.60	12.65	13.35	15.00	16.55	17.95
12	10.30	11.40	12.20	13.35	14.55	15.90	17.70	19.10
13	11.30	11.95	12.30	14.00	15.45	16.80	18.75	20.30
14	11.75	12.45	13.40	14.70	16.20	17.70	19.80	21.45
15	12.25	13.00	14.00	15.40	17.00	18.50	20.35	22.50
16	12.70	13.50	14.55	16.10	17.80	19.50	21.90	23.80
17	13.20	14.05	15.15	16.75	18.60	20.40	22.95	24.95
18	13.65	14.55	15.75	17.45	19.40	21.30	24.00	25.10
19	14.15	15.10	16.35	18.15	20.20	22.20	25.05	27.30
20	14.60	15.60	16.95	18.30	21.00	23.10	25.15	28.45
21	15.10	16.15	17.55	19.50	21.30	24.00	27.20	29.50
22	15.55	16.55	18.10	20.20	22.50	24.90	28.25	30.30
23	16.05	17.20	18,70	20.30	23.35	25.30	29.30	31.35
24	16.50	17.70	19.10	21.55	24.15	25.70	30.35	33.10
25	17.00	18.25	19.30	22.25	24.95	27.50	31.40	34.30
26	17.45	18.75	20.50	22.35	25.75	28.50	32.45	35.45
27	17.95	19.30	21.10	23.55	26.55	29.40	33.50	35.55
28	18.40	19.30	21.55	24.30	27.35	30.30	34.55	37.30
29	18.90	20.35	22.25	25.00	28.15	31.20	35.50	38.85
30	19.35	20.35	22.35	25.70	28.95	32.10	35.35	40.15
31	19.85	21.40	23.45	25.85	29.75	33.00	37.70	41.30
32	20.30	21.90	24.05	27.35	30.50	33.95	38.75	42.45
33	20.30	22.45	24.55	27.75	31.30	34.35	39.80	43.55
34	21.25	22.95	25.20	28.45	32.10	35.75	40.35	44.30
35	21.75	23.50	25.30	29.10	32.30	36.55	41.90	45.95
36	22.20	24.00	26.40	29.30	33.70	37.55	42.95	47.15
37	22.70	24.55	27.00	30.50	34.50	38.45	44.00	48.30
38	23.15	25.05	27.50	31.15	35.30	39.35	45.05	49.45
39	23.55	25.50	28.20	31.35	36.10	40.25	46.10	50.55
40	24.10	25.15	28.75	32.55	36.90	41.15	47.15	51.30

SCHEDULE A-3—Continued

Express Mail
SAME DAY AIRPORT SERVICE
(dollars)

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
41	24.50	26.55	29.35	33.25	37.55	42.05	48.20	52.35
42	25.05	27.20	29.95	33.90	38.45	42.95	49.25	54.15
43	25.55	27.70	30.55	34.60	39.25	43.35	50.30	55.30
44	26.00	28.25	31.15	35.30	40.05	44.75	51.35	56.45
45	26.50	28.75	31.75	36.00	40.35	45.55	52.40	57.55
46	26.95	29.30	32.30	36.55	41.55	46.55	53.45	58.80
47	27.45	29.30	32.30	37.35	42.45	47.45	54.50	60.00
48	27.90	30.35	33.50	38.25	43.25	48.35	55.55	61.15
49	28.40	30.35	34.10	38.70	44.05	49.25	56.50	62.30
50	28.85	31.40	34.70	39.40	44.80	50.15	57.55	63.50
51	29.35	31.90	35.30	40.10	45.50	51.05	58.70	64.55
52	29.85	32.45	35.90	40.30	45.40	51.95	59.75	65.30
53	30.30	32.95	36.45	41.45	47.20	52.85	60.30	67.00
54	30.80	33.50	37.05	42.15	48.00	53.75	61.85	68.15
55	31.25	34.00	37.55	42.35	48.80	54.65	62.90	69.30
56	31.75	34.55	38.25	43.50	49.60	55.55	63.95	70.50
57	32.20	35.05	38.35	44.20	50.40	56.45	65.00	71.65
58	32.70	35.50	39.45	44.90	51.20	57.35	66.05	72.80
59	33.15	36.10	40.00	45.30	51.95	58.25	67.10	74.00
60	33.65	36.53	40.50	46.25	52.75	59.15	68.15	75.15
61	34.10	37.15	41.20	46.95	53.55	60.05	69.20	76.30
62	34.50	37.70	41.30	47.65	54.35	60.35	70.25	77.50
63	35.05	38.20	42.40	48.30	55.15	61.85	71.35	78.65
64	35.55	38.75	43.00	49.00	55.95	62.75	72.40	79.80
65	36.00	39.25	43.55	49.70	56.75	63.65	73.45	81.00
66	36.50	39.30	44.15	50.40	57.55	64.53	74.50	82.15
67	36.95	40.30	44.75	51.05	58.55	65.45	75.55	83.15
68	37.45	40.35	45.35	51.75	59.10	66.35	76.50	84.50
69	37.90	41.35	45.95	52.45	59.90	67.25	77.55	85.65
70	38.40	41.90	46.55	53.15	60.80	68.15	78.70	86.55

SCHEDULE A-4

Express Mail

NEXT DAY SERVICE

(dollars)

POST OFFICE TO POST OFFICE

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
1	5.30	5.50	5.60	5.70	5.80	5.90	6.05	6.15
2	5.70	6.10	6.20	6.40	6.65	6.85	7,15	7.35
3	6.05	6.55	6.85	7.15	7.45	7.80	8.25	8.60
4	6.40	7.20	7.30	7.55	8.30	8.70	9.15	9.30
5	6.75	7.30	8.10	8.50	9.15	9.55	10.45	11.30
6	7.15	8.35	8.75	9.30	10.00	10.50	11.50	12.20
7	7.50	8.90	9.40	10.05	10.30	11.55	12.60	13.40
8	7.85	9.50	10.00	10.75	11.55	12.50	13.70	14.30
9	8.25	10.05	10.55	11.50	12.50	13.45	14.30	15.35
10	8.60	10,50	11.30	12.20	13.30	14,53	15.30	17.05
11	8.95	11.20	11.90	12.95	14.15	15.30	17.00	18.25
12	9.30	11.75	12.55	13.55	15.00	16.25	18.10	19.45
13	9.70	12.00	13.15	14.40	15.85	17.20	19.15	20.55
14	10.05	12.90	13.80	15.15	16.55	18.15	20.25	21.85
15	10.40	13.45	14.45	15.35	17.50	19.05	21.35	23.05
16	10.75	14.00	15.05	16.80	18.35	20.00	22.45	24.30
17	11.15	14.50	15.70	17.30	19.20	20.35	23.55	25.50
18	11.50	15.15	16.35	18.05	20.00	21.90	24.55	25.70
19	11.35	15.70	16.95	18.75	20.35	22.35	25.75	27.90
20	12.20	15.25	17.50	19.50	21.70	23.30	25.80	29.10
21	12.50	15.35	18.50	20.20	22.55	24.70	27.90	30.30
22	12.95	17.40	18.35	20.95	23.35	25.55	29.80	31.55
23	13.30	17.95	19.50	21.55	24.20	26.50	30.10	32.75
24	13.33	18.55	20.10	22.40	25.05	27.53	31.2C	33.95
25	14.05	19.10	20.75	23.10	25.35	28.50	32.30	35.15
26	14.40	19.35	21.40	23.35	26.70	29.40	33.40	35.35
27	14.75	20.25	22.20	24.55	27.55	30.35	34.50	37.55
28	15.15	20.30	22.55	25.30	29.40	31.30	35.53	38.75
29	15.30	21.35	22.30	25.00	29.30	32.25	36.53	40.00
30	15.35	21.95	22.30	25.75	30.35	33.20	37.75	41.20
31	15.20	22.50	24.35	27.45	30.30	34.10	38.35	42.40
32	15.30	23.05	25.20	28.20	31.75	35.25	39.35	43.50
33	15.95	23.65	25.30	28.90	32.58	35.30	41.05	44.30
34	17.30	24.20	25.45	29.55	33.40	35.95	42.15	46.30
35	17.65	24.75	27.05	30.35	34.25	37.90	43.20	47.25
36	18.05	25.30	27.70	31.10	35.05	38.35	44.30	48.45
37	18.40	25.30	28.35	31.85	35.30	39.75	45.40	49.55
38	18.75	25.45	28.95	32.55	35.75	40.70	46.50	50.35

SCHEDULE A-4—Continued

Express Mail

NEXT DAY SERVICE

(dollars)

POST OFFICE TO POST OFFICE

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
39	19.10	27.00	29.50	33.30	37.50	41.55	47.50	52.05
40	19.50	27.60	30.25	34.00	38.20	42.50	48.70	53.25
41	19.35	28.15	30.35	34.75	39.25	43.55	49.30	54.45
42	20.20	28.70	31.50	35.45	40.10	44.45	50.90	55.70
43	20.55	29.30	32.15	35.20	40.95	45.40	51.95	55.90
44	20.35	29.35	32.75	35.90	41.75	46.35	53.05	58.10
45	21.30	30.40	33.40	37.65	42.60	47.30	54.15	59.30
46	21.55	31.00	34.05	38.35	43.45	48.25	55.25	60.50
47	22.00	31.55	34.65	39.10	44.25	49.20	56.35	61.70
48	22.40	31.10	35.30	39.30	45.10	50.10	57.45	62.90
49	22.75	32.70	35.90	40.55	45.95	51.05	58.55	64.15
50	23.10	33.25	36.55	41.25	46.80	52.00	59.60	65.35
51	23.50	33.80	37.20	42.00	47.50	52.95	60.70	66.55
52	23.35	34.35	37.30	42.70	48.45	53.90	61.30	67.75
53	24.20	34.95	38.45	43.45	49.30	54.30	62.90	68.95
54	24.55	35.50	39.10	44.15	50.15	55.75	64.00	70.15
55	24.95	36.05	39.70	44.90	50.95	56.70	65.10	71.40
56	25.30	36.55	40.35	45.60	51.80	57.55	66.20	72.50
57	25.65	37.20	41.00	46.35	52.65	58.60	67.30	73.80
58	26.00	37.75	41.60	47.10	53.50	59.55	68.35	75.00
59	26.40	38.35	42.25	47.30	54.30	60.45	69.45	76.20
60	26.75	38.90	42.35	48.55	55.15	61.40	70.55	77.40
61	27.10	39.45	43.50	49.25	56.00	62.35	71.55	78.50
62	27.45	40.05	44.15	50.00	56.80	63.30	72.75	79.35
63	27.85	40.50	44.75	50.70	57.65	64.25	73.85	81.05
64	28.20	41.15	45.40	51.45	58.50	65.15	74.95	82.25
65	28.53	41.75	46.05	52.15	59.35	66.10	75.00	83.45
66	28.90	42.30	46.63	52.90	60.15	67.05	77.10	84.55
67	29.30	42.85	47.30	53.60	61.00	68.00	78.20	85.35
68	29.53	43.35	47.95	54.35	61.85	68.95	79.30	87.10
69	30.00	44.00	48.55	55.05	62.70	69.85	80.40	88.30
70	30.35	44.55	49.20	55.30	63.50	70.80	81.50	89.50

Add $5.60 for each pickup stop

SCHEDULE A-5

NEXT DAY SERVICE

(dollars)

POST OFFICE TO ADDRESSEE

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
1	8.85	9.05	9.10	9.20	9.30	9.40	9.55	9.70
2	9.20	9.60	9.75	9.90	10.15	10.35	10.65	10.90
3	9.55	10.15	10.35	10.55	11.00	11.30	11.75	12.10
4	9.90	10.75	11.00	11.40	11.80	12.25	12.85	13.20
5	10.30	11.30	11.55	12.10	12.65	13.20	13.95	14.50
6	10.65	11.85	12.25	12.85	13.50	14.10	15.05	15.70
7	11.00	12.45	12.90	13.55	14.35	15.05	15.10	16.90
8	11.40	13.00	13.55	14.30	15.15	15.00	17.20	18.15
9	11.75	13.55	14.15	15.00	15.00	15.95	18.30	18.35
10	12.10	14.55	14.80	15.75	15.85	17.90	18.40	20.55
11	12.45	14.70	15.40	15.45	17.65	18.30	20.50	21.75
12	12.85	15.25	15.95	17.20	18.50	19.75	21.50	22.85
13	13.20	15.55	16.70	17.90	18.35	20.70	22.70	24.15
14	13.55	16.40	17.30	18.55	20.20	21.65	23.60	25.40
15	13.30	16.95	17.95	19.35	21.00	22.60	24.35	25.50
16	14.30	17.50	18.50	20.10	21.85	22.50	25.95	27.30
17	14.65	18.10	19.20	20.30	22.70	24.45	27.05	29.30
18	15.00	18.35	19.25	21.55	23.55	25.40	28.15	30.20
19	15.35	19.20	20.50	22.25	24.35	25.35	29.25	31.40
20	15.75	19.30	21.10	23.00	25.20	27.30	30.35	32.60
21	16.10	20.35	21.75	23.70	25.05	25.25	31.45	33.35
22	16.45	20.90	22.35	24.35	25.35	29.15	32.50	35.05
23	16.80	21.50	23.00	25.15	27.70	30.10	33.50	35.35
24	17.20	22.05	23.35	25.90	28.55	31.05	34.70	34.75
25	17.35	22.30	24.25	25.55	29.40	32.00	35.30	38.55
26	17.30	23.20	24.30	27.35	30.20	32.35	36.80	39.15
27	18.25	23.75	25.55	20.10	31.05	33.35	38.00	41.10
28	18.55	24.30	25.15	29.30	31.90	34.30	39.10	42.30
29	19.00	24.30	25.50	29.55	32.75	35.75	40.20	43.50
30	19.35	25.45	27.45	30.25	33.55	35.70	41.25	44.70
31	19.75	25.00	28.65	31.00	34.20	37.55	42.25	45.80
32	20.10	25.55	28.70	31.70	35.25	38.50	43.45	47.10
33	20.45	27.15	29.30	32.45	35.10	39.50	44.35	48.10
34	20.30	27.70	29.95	33.15	35.90	40.45	45.35	49.35
35	21.20	28.25	30.50	33.90	37.75	41.40	47.75	50.75
36	21.55	28.85	31.10	34.50	38.50	42.35	47.35	51.95
37	21.90	29.40	31.35	35.35	39.40	43.30	48.90	53.15
38	22.25	29.95	32.50	35.05	40.25	44.20	50.00	54.25
39	22.55	30.55	33.10	36.30	41.10	45.15	51.10	55.35
40	23.00	31.10	33.75	37.50	41.95	46.10	52.20	56.30

SCHEDULE A-5—Continued

NEXT DAY SERVICE

(dollars)

POST OFFICE TO ADDRESSEE

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
41	23.35	31.65	34.40	38.25	42.75	47.05	53.10	58.00
42	23.70	32.25	35.00	39.35	43.30	48.00	54.40	59.20
43	24.10	32.30	35.55	39.70	44.45	48.95	55.50	60.40
44	24.45	33.35	36.25	40.40	45.10	49.35	55.30	61.50
45	24.80	33.95	29.90	41.13	46.10	90.80	57.55	62.80
46	25.15	34.50	37.55	41.90	46.35	51.75	58.75	64.00
47	25.55	35.05	37.15	42.50	47.80	52.70	59.85	65.25
48	25.90	35.60	38.00	43.35	48.30	53.55	60.95	65.45
49	25.25	36.20	39.45	44.05	49.45	54.55	62.05	67.55
50	26.55	36.75	40.05	44.30	50.30	55.50	63.15	68.35
51	27.00	37.30	40.70	45.50	51.15	56.45	54.25	70.05
52	27.35	37.90	41.35	46.25	51.95	57.40	63.30	71.25
53	27.70	38.45	41.35	46.35	52.30	58.35	66.40	72.45
54	28.10	39.00	42.50	47.70	53.65	59.30	57.30	73.70
55	28.45	39.60	43.25	48.40	54.50	60.20	68.50	74.30
56	28.80	40.15	43.35	49.15	55.30	61.15	67.70	76.10
57	20.15	40.70	44.50	49.35	56.15	62.10	70.30	77.10
58	29.55	40.30	45.10	50.60	57.00	63.05	71.90	78.50
59	29.90	41.35	45.75	51.30	57.30	64.00	72.95	79.70
60	30.25	42.40	46.40	52.05	68.55	64.90	74.05	80.35
61	30.60	43.00	47.00	52.75	59.50	65.85	75.15	82.15
62	31.00	43.55	47.65	53.50	60.35	66.30	76.25	83.25
63	31.35	44.10	48.30	54.20	61.15	67.75	77.35	84.55
64	31.70	44.70	48.90	54.95	62.00	68.70	78.45	85.75
65	32.05	45.25	49.55	55.55	62.35	69.30	79.55	86.35
66	32.45	45.30	50.20	56.40	63.70	70.55	80.55	88.15
67	32.80	46.35	50.80	57.10	64.50	71.50	81.75	89.40
68	33.15	46.35	51.45	57.65	65.15	72.45	82.30	90.50
69	33.50	47.50	52.05	58.50	68.20	73.40	83.90	91.30
70	33.90	48.05	52.70	59.10	69.05	74.35	85.00	93.00

Add: $5.60 for each pickup stop.

APPENDIX ONE

SECHEDULE A-6

Express Mail

CUSTOM DELIVERY SERVICE

(dollars)

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
1	8.55	8.75	8.80	8.90	9.00	9.10	9.25	9.40
2	8.90	9.30	9.45	9.65	9.85	10.05	10.35	10.60
3	9.25	9.90	10.10	10.35	10.70	11.00	11.45	11.80
4	9.55	10.45	10.70	11.10	11.55	11.85	12.55	13.00
5	10.00	11.00	11.35	11.50	12.35	12.90	13.55	14.20
6	10.35	11.53	11.95	12.55	13.20	13.35	14.75	15.45
7	10.70	12,15	12.50	13.25	14.05	14.75	15.85	16.55
8	11.10	12.70	13.25	14.00	14.35	15.70	16.95	17.85
9	11.45	13.23	13.35	14.70	15.70	16.55	18.00	19.05
10	11.80	13.85	14.30	14.45	15.55	17.50	19.10	20.25
11	12.15	14.40	15.15	15.15	17.40	18.55	20.20	21.45
12	12.55	14.95	15.75	15.90	18.20	19.45	21.20	22.55
13	12.90	15.55	16.40	17.50	19.05	20.40	22.40	23.90
14	13.25	16.10	17.05	18.35	19.90	21.35	23.50	25.10
15	13.55	16.55	17.55	19.05	20.75	22.30	24.50	25.30
16	14.00	17.25	18.30	19.30	21.55	23.25	25.55	27.50
17	14.35	17.30	18.90	20.55	22.40	24.15	26.75	28.70
18	14.70	18.35	19.55	21.25	23.25	25.10	27.55	29.90
19	15.10	18.35	20.20	22.50	24.05	26.55	28.55	31.15
20	15.45	19.50	20.30	22.70	24.90	27.00	30.05	32.35
21	15.80	20.05	21.45	23.45	25.75	27.95	31.15	33.55
22	16.15	20.55	22.10	24.15	26.50	28.90	32.25	34.75
23	16.55	21.20	22.70	24.30	27.40	29.30	33.35	35.95
24	16.90	21.75	23.35	25.60	28.25	30.75	34.40	37.15
25	17.25	22.30	24.00	25.35	29.10	31.70	35.50	38.35
26	17.50	22.90	24.50	27.05	29.35	32.35	36.30	39.50
27	18.00	23.45	25.25	27.30	30.75	33.50	37.70	40.30
28	18.35	24.00	25.35	28.30	31.50	34.50	38.30	42.00
29	18.70	24.50	25.50	29.25	32.45	35.45	39.90	43.20
30	19.05	25.15	27.15	29.95	33.30	35.40	41.00	44.40
31	19.45	25.70	27.75	30.70	34.10	37.35	42.05	45.50
32	19.80	26.30	28.40	31.40	34.35	38.30	43.15	46.30
33	20.15	26.35	29.05	32.15	35.30	39.25	44.25	48.05
34	20.55	27.40	29.35	32.95	35.50	40.15	45.35	49.25
35	20.30	28.00	30.30	33.50	37.45	41.10	46.45	50.45
36	21.25	28.55	30.95	34.30	38.30	42.05	47.55	51.55
37	21.50	29.10	32.55	35.05	39.15	43.00	48.55	52.85
38	22.00	29.70	32.20	35.75	39.05	43.95	49.70	54.05
39	22.35	30.25	32.30	36.50	40.30	44.95	50.80	55.30
40	22.70	30.30	33.45	37.25	41.55	45.80	51.30	55.50

SCHEDULE A-6—Continued

Express Mail
CUSTOM DELIVERY SERVICE
(dollars)

LBS	ZONE 2	ZONE 3	ZONE 4	ZONE 5	ZONE 6	ZONE 7	ZONE 8	ZONE 9
41	23.05	31.35	34.10	37.35	42.50	46.75	53.00	57.70
42	23.45	31.95	34.70	38.70	43.30	47.70	54.10	58.90
43	23.50	32.50	35.35	39.40	44.15	48.55	55.20	60.10
44	24.15	33.05	36.00	40.15	45.00	49.50	56.30	61.10
45	24.50	33.55	36.50	40.35	45.80	50.50	57.40	62.50
46	24.90	34.20	37.25	41.50	46.55	51.45	58.45	63.75
47	25.25	34.75	37.90	42.30	47.50	52.40	59.55	64.95
48	25.50	35.35	38.50	43.05	48.35	53.25	60.55	66.15
49	25.95	35.90	39.15	43.75	49.15	54.30	61.75	67.35
50	26.35	36.45	39.75	44.50	50.00	55.20	62.35	68.55
51	26.70	37.05	40.20	45.20	50.35	56.15	63.35	69.75
52	27.05	37.60	41.05	45.95	51.70	57.10	66.05	71.00
53	27.40	38.15	41.55	46.55	52.50	58.05	66.10	72.20
54	27.30	38.75	42.30	47.40	53.35	59.00	67.20	73.40
55	28.15	39.30	42.95	48.10	54.20	59.95	68.30	74.50
56	28.50	39.35	43.55	48.35	55.00	60.85	69.40	75.30
57	28.90	40.40	44.20	49.55	55.85	61.30	70.50	77.00
58	29.25	41.00	44.35	50.30	56.70	62.75	71.60	78.20
59	29.50	41.55	45.45	51.00	57.55	63.70	72.70	79.45
60	29.95	42.10	46.10	51.75	58.35	64.55	73.80	80.55
61	30.35	42.70	46.75	52.50	59.20	65.55	74.35	81.85
62	30.70	43.25	47.35	53.20	60.05	66.50	75.05	83.05
63	31.05	43.30	48.00	53.95	60.90	67.45	77.05	84.25
64	31.40	44.40	48.50	54.55	61.70	68.40	78.15	85.45
65	31.30	44.95	49.25	55.40	62.55	69.35	79.25	86.70
66	32.15	45.50	49.30	56.10	63.40	70.25	80.35	87.90
67	32.50	46.10	50.50	56.85	64.25	71.20	81.45	89.10
68	32.85	46.55	51.15	57.55	65.05	72.15	82.50	90.30
69	33.25	47.20	51.80	58.30	63.90	73.10	83.50	91.50
70	33.60	47.30	52.40	59.00	66.75	74.35	84.70	92.70

Add: $5.60 for each pickup or delivery stop.

SCHEDULE B-1

Second-Class Mail:
In-County and Transient

In-County	
Pound-rate matter:	**Full Rate (cents)**
Per-pound	5.8
Per-piece:	
Presorted to carrier route (Category C)	3.2
Not presorted to carrier route	3.7
Transient	
Up to 1 ounce	15
Over 1 up to 2 ounces	33
Over 2 up to 3 ounces	49
Each additional ounce up to 8 ounces	10
Each additional 2 ounces for pieces over 8 ounces	10

SCHEDULE B-2

Second-Class Mail: Publications of Authorized Nonprofit Organizations, Outside County

	Postage Rate Unit	Full Rate [1] (cents)
Per-Pound		
Nonadvertising portion	Pound	10.0
Advertising Portion [2]		
Zone 1 & 2	Pound	13.3
3	Pound	14.3
4	Pound	16.0
5	Pound	18.7
6	Pound	21.5
7	Pound	24.8
8	Pound	27.7
Per-Piece		
Category A: Outgoing/incoming distribution required	Piece	7.8
Category B: Incoming distribution only required	Piece	6.2
Category C: Presorted to carrier route or finer	Piece	5.2
Commingled Pieces: The rate in schedule B-4 for regular mail.		

[1] Charges for second-class nonprofit mail are computed by adding the per-piece charge to the sum of the nonadvertising portion charge and the advertising portion charge, as applicable.

[2] Not applicable to publications containing 10 percent or less advertising content.

SCHEDULE B-3

Second-Class Mail:

Classroom Publications, Outside County

	Postage Rate Unit	Full Rate [1] (cents)
Per-Pound		
Nonadvertising portion	Pound	6.4
Advertising portion:		
Zone 1 & 2	Pound	8.6
3	Pound	9.7
4	Pound	11.7
5	Pound	14.7
6	Pound	17.9
7	Pound	21.6
8	Pound	24.9
Per-Piece	Piece	3.6
Commingled pieces:		
The rate in Schedule B-4 for regular mail.		

[1] Charges for classroom publications are computed by adding the per-piece charge to the sum of the nonadvertising portion charge and the advertising portion charge, as applicable.

SCHEDULE B-4

Second-Class Mail:
Regular Rate Publications, Outside County
(cents)

	Regular	Limited [1] Circulation
Subscriber copies and sample copies within 10 percent limitation:		
Per-Pound		
Nonadvertising portion	10.6	10.6
Advertising portion:		
Zones 1 & 2	14.2	14.2
3	15.4	15.4
4	17.7	17.7
5	21.5	21.5
6	25.8	25.8
7	30.1	30.1
8	34.8	34.8
Per-Piece A*	8.0	6.9
Per-Piece B**	6.4	5.3
Per-Piece C***	5.4	4.8

* Publications mailing 5,000 or more copies per issue outside county of publication, Category A: Outgoing/incoming distribution required (SCF, states, and mixed states).

** Publications mailing 5,000 or more copies per issue outside county of publication, Category B: Incoming distribution only required (3-digit city and 5-digit).

*** Publications mailing 5,000 or more copies per issue outside county of publication, Category C: By-pass outgoing and incoming distributions (carrier route or finer).

---

[1] Limited circulation rates apply to publications that mail less than 5,000 copies per issue to be delivered outside the county of publication. Commingled pieces of limited circulation publications are subject to the piece rate indicated for regular publications.

[2] Per-pound advertising portion rate for science of agriculture publications mailed to zones 1 and 2 is 13.3 cents.

SCHEDULE C

Third-Class Mail

	Full Rate (cents)
Single Piece:	
First Ounce	18
Nonstandard Surcharge for pieces weighing one ounce or less	9
Each additional ounce up to 4 ounces	17
Over 4 to 6 ounces	70
Each additional 2 ounces up to 14 ounces	22
Last additional 2 ounces (over 14 to 15.99)	23
Keys and Identification Devices:	
First 2 ounces	53
Each additional 2 ounces	30
Regular Bulk: [1]	
(SEE APPENDIX THREE)	
Nonprofit Bulk: [1]	
(SEE APPENDIX THREE)	

[1] A fee of $40 must be paid once each calendar year for each bulk mailing permit.

SCHEDULE D-1

Fourth-Class Mail: Special and Library Rates

	Full Rate (cents)
Special:	
First pound	
Not presorted	63
Presorted to 5-digits [1] [2]	46
Presorted to BMC [1] [3]	58
Each additional pound through 7 pounds	23
Each additional pound over 7 pounds	14
Library:	
First pound	50
Each additional pound through 7 pounds	17
Each additional pound over 7 pounds	9.5

[1] A fee of $40 must be paid once each calendar year for each permit.

[2] For mailings of 500 or more pieces properly prepared and presorted to five-digit destination ZIP Codes (§ 400.331a(1) of the Classification Schedule effective July 6, 1976).

[3] For mailings of 500 or more pieces properly prepared and presorted to Bulk Mail Centers.

SCHEDULE D-2

Fourth-Class Mail: Single-Piece Bound Printed Matter

Rates for Pieces Weighing Up to (Pounds)	Rate (Dollars) Zones							
	Local	1&2	3	4	5	6	7	8
1.5	.28	.39	.43	.49	.58	.68	.78	.91
2	.31	.43	.48	.56	.68	.82	.95	1.12
2.5	.34	.47	.53	.63	.78	.95	1.12	1.34
3	.37	.51	.59	.70	.88	1.09	1.29	1.55
3.5	.40	.55	.64	.77	.98	1.23	1.46	1.76
4	.42	.59	.69	.85	1.09	1.36	1.63	1.98
4.5	.45	.63	.74	.92	1.19	1.50	1.80	2.19
5	.48	.67	.80	.99	1.29	1.64	1.98	2.41
6	.54	.74	.90	1.13	1.49	1.91	2.32	2.83
7	.59	.82	1.01	1.28	1.70	2.18	2.66	3.26
8	.65	.90	1.11	1.42	1.90	2.45	3.00	3.69
9	.70	.98	1.22	1.57	2.11	2.73	3.34	4.11
10	.76	1.06	1.32	1.71	2.31	3.00	3.68	4.54
Per-Piece (cents)	20.0	27.0	27.0	27.0	27.0	27.0	27.0	27.0
Per-Pound (cents)	5.6	7.9	10.5	14.4	20.4	27.3	34.1	42.7

SCHEDULE D-3

Fourth-Class Mail: Bulk Bound Printed Matter

Zones	Per Piece (cents)	Per Pound (cents)
Local	20	4.0
1 & 2	27	5.8
3	27	8.4
4	27	12.2
5	27	18.2
6	27	25.1
7	27	32.0
8	27	40.6

APPENDIX ONE

SCHEDULE D-4

Parcel Post Rate Schedule
(dollars)

ZONE LBS	LOCAL	1&2	3	4	5	6	7	8
2	1.52	1.55	1.61	1.70	1.83	1.99	2.15	2.48
3	1.58	1.63	1.73	1.86	2.06	2.30	2.55	3.05
4	1.65	1.71	1.84	2.02	2.29	2.61	2.94	3.60
5	1.71	1.79	1.96	2.18	2.52	2.92	3.32	4.07
6	1.78	1.87	2.07	2.33	2.74	3.14	3.64	4.54
7	1.84	1.95	2.18	2.49	2.89	3.38	3.95	5.02
8	1.91	2.03	2.30	2.64	3.06	3.63	4.27	5.55
9	1.97	2.11	2.41	2.75	3.25	3.93	4.63	6.08
10	2.04	2.19	2.52	2.87	3.46	4.22	5.00	6.62
11	2.10	2.28	2.60	3.00	3.68	4.51	5.38	7.15
12	2.17	2.36	2.66	3.10	3.89	4.80	5.75	7.69
13	2.21	2.41	2.72	3.19	4.02	4.96	5.95	7.97
14	2.26	2.46	2.78	3.28	4.13	5.12	6.14	8.24
15	2.31	2.51	2.83	3.36	4.25	5.26	6.32	8.48
16	2.35	2.56	2.89	3.44	4.35	5.40	6.49	8.72
17	2.40	2.59	2.94	3.51	4.45	5.53	6.65	8.94
18	2.44	2.64	2.99	3.59	4.55	5.65	6.80	9.15
19	2.48	2.68	3.04	3.66	4.64	5.77	6.94	9.35
20	2.52	2.72	3.10	3.73	4.73	5.89	7.09	9.55
21	2.56	2.76	3.14	3.79	4.82	6.00	7.22	9.73
22	2.60	2.81	3.20	3.86	4.90	6.10	7.35	9.91
23	2.64	2.84	3.25	3.92	4.99	6.21	7.48	10.08
24	2.68	2.93	3.36	4.02	5.07	6.31	7.60	10.24
25	2.72	3.00	3.47	4.15	5.14	6.40	7.75	10.40
26	2.76	3.04	3.56	4.27	5.27	6.58	8.02	10.56
27	2.79	3.08	3.65	4.40	5.44	6.79	8.28	10.71
28	2.83	3.13	3.70	4.47	5.59	7.00	8.53	10.85
29	2.87	3.17	3.75	4.53	5.76	7.17	8.64	10.99
30	2.90	3.21	3.80	4.59	5.84	7.27	8.75	11.13
31	2.97	3.25	3.85	4.65	5.91	7.26	8.86	11.29
32	3.01	3.30	3.90	4.71	5.98	7.44	8.96	11.41
33	3.05	3.34	3.95	4.76	6.05	7.53	9.06	11.53
34	3.08	3.38	4.00	4.82	6.12	7.61	9.16	11.76
35	3.12	3.42	4.04	4.88	6.19	7.69	9.26	12.07
36	3.16	3.44	4.08	4.93	6.25	7.78	9.36	12.07
37	3.20	3.50	4.14	4.98	6.32	7.86	9.45	12.20
38	3.23	3.54	4.18	5.04	6.39	7.93	9.54	12.51
39	3.27	3.58	4.23	5.09	6.45	8.01	9.63	12.82
40	3.31	3.62	4.27	5.14	6.51	8.09	9.72	13.08

SCHEDULE D-4—Continued

Parcel Post Rate Schedule
(dollars)

ZONE LBS	LOCAL	1&2	3	4	5	6	7	8
41	3.34	3.66	4.32	5.19	6.58	8.16	9.81	13.20
42	3.38	3.70	4.36	5.24	6.64	8.24	9.90	13.31
43	3.42	3.74	4.40	5.29	6.70	8.31	9.98	13.42
44	3.46	3.78	4.45	5.34	6.76	8.38	10.14	13.53
45	3.49	3.81	4.49	5.39	6.82	8.45	10.36	13.64
46	3.53	3.85	4.53	5.44	6.88	8.52	10.58	13.74
47	3.56	3.89	4.58	5.49	6.94	8.66	10.80	13.85
48	3.60	3.93	4.62	5.54	6.99	8.83	11.02	13.95
49	3.64	3.97	4.66	5.59	7.05	9.01	11.24	14.05
50	3.67	4.01	4.71	5.64	7.13	9.18	11.46	14.15
51	3.71	4.04	4.75	5.69	7.27	9.36	11.68	14.25
52	3.74	4.08	4.79	5.79	7.40	9.53	11.90	14.35
53	3.78	4.12	4.83	5.90	7.54	9.71	12.12	14.44
54	3.82	4.16	4.87	6.00	7.67	9.88	12.34	14.54
55	3.85	4.19	4.94	6.11	7.81	10.06	12.56	14.76
56	3.89	4.23	5.02	6.21	7.94	10.23	12.78	15.02
57	3.92	4.27	5.11	6.32	8.08	10.41	13.00	15.28
58	3.96	4.32	5.19	6.42	8.21	10.58	13.22	15.54
59	3.99	4.39	5.28	6.53	8.35	10.76	13.44	15.80
60	4.03	4.46	5.36	6.63	8.48	10.93	13.66	16.06
61	4.06	4.53	5.45	6.74	8.62	11.11	13.88	16.32
62	4.10	4.60	5.53	6.84	8.75	11.28	14.10	16.58
63	4.13	4.67	5.62	6.95	8.89	11.46	14.32	16.84
64	4.17	4.74	5.70	7.05	9.02	11.63	14.54	17.10
65	4.20	4.81	5.79	7.16	9.16	11.81	14.76	17.36
66	4.24	4.88	5.87	7.26	9.29	11.98	14.98	17.62
67	4.27	4.95	5.96	7.37	9.43	12.16	15.20	17.88
68	4.31	5.02	6.04	7.47	9.56	12.33	15.42	18.14
69	4.34	5.09	6.13	7.58	9.70	12.51	15.64	18.40
70	4.38	5.16	6.21	7.68	9.83	12.68	15.86	18.66

For intra-BMC parcels, deduct 14¢.
For nonmachinable inter-BMC parcels, add 50¢.

SCHEDULE E-1

Special Services: Address Corrections

Description	Fee
Per Correction	$0.25

SCHEDULE E-2

Special Services: Certificates of Mailing

Description	Fees (in addition to postage)
Individual Pieces	
Original certificate of mailing for individually listed pieces of all classes of ordinary mail.	$0.40 each
Each additional copy of original certificate of mailing or original mailing receipt for registered, insured, certified and c.o.d. mail	0.40 each
Bulk Pieces	
Identical pieces of first- and third-class mail paid with ordinary stamps, precancelled stamps or meter stamps:	
Up to 1,000 pieces (1 certificate for total number)	1.35
Each additional 1,000 pieces or fraction	0.15
Duplicate copy	0.40

SCHEDULE E-3

Special Services: Certified Mail

Description	Fees (in addition to postage)
Per Piece	$0.75

SCHEDULE E-4

Special Services: Collect on Delivery

Amount to be Collected, or Insurance Coverage Desired	Fees (in addition to postage)
$ 0.01 to $ 10	$1.20
10.01 to 25	1.50
25.01 to 50	1.80
50.01 to 100	2.15
100.01 to 200	2.55
200.01 to 300	3.00
300.01 to 400	3.60
Notice of nondelivery of C.O.D.	1.10
Alteration of C.O.D. charges or designation of new addressee	1.10
Registered C.O.D.	1.20

APPENDIX ONE

SCHEDULE E-5

Special Services: Dead Letter Return

Description	Fee
Per-Piece (first-class letters and parcels only)	$0.70

SCHEDULE E-6

Special Services: Insured Mail

Liability	Fees (in addition to postage)
$ 0.01 to $ 20	$0.45
20.01 to 50	0.85
50.01 to 100	1.25
100.01 to 150	1.70
150.01 to 200	2.05
200.01 to 300	3.45
300.01 to 400	4.70

SCHEDULE E-7

Special Services: Lockbox/Caller Service

A. Rental Rates for Lockboxes

	Fee Per Semi-Annual Period				
Cubic inch capacity of lockboxes	TO 265	266 to 500	500 to 1,000	1,000 to 2,000	2,000 and over
Box Size	1	2	3	4	5
Group I	$10	$13	$22.50	$34.50	$51.00
Group II	2.50	3.50	5.50	8.50	13.00
Group III	1.00	1.00	1.00	1.00	1.00

B. Caller Service

Description	Fees
For Caller Service (Semi-Annual)	$95
For Each Reserved Call Number (Annual)	$10

SCHEDULE E-8

Special Services: Meter Setting on Site

Description	Fees
Meter Company Adjustments:	$ 8.50
All Other Meter Settings:	
First Meter	
By Appointment	14.00
Unscheduled Request	16.00
Additional Meters	4.00 each

Schedule E-9

Special Services: Money Orders

Amount	Fee
$ 0.01 to $ 25	$0.75
25.01 to 50	1.10
50.01 to 500	1.55
APO-FPO	
$ 0.01 to $500	$0.25

SCHEDULE E-10

Special Services: Parcel Air Lift

Description	Fees (in addition to parcel post postage)
Up to 2 pounds	$0.30
Over 2 up to 3 pounds	0.60
Over 3 up to 4 pounds	0.90
Over 4 pounds	1.20

SCHEDULE E-11

Special Services: Permit Imprints

Description	Fee
Per Permit	$40

SCHEDULE E-12

Special Services: Registered Mail

Fees (in addition to postage)

Value	For Articles Not Covered By Insurance Fees	For Articles Covered By Insurance Fees
$ 0.00 to $ 100	$3.25	$3.30
$ 100.01 to $ 500	3.55	3.60
$ 500.01 to $ 1,000	3.85	3.90
$ 1,000.01 to $ 2,000	4.10	4.20
$ 2,000.01 to $ 3,000	4.35	4.50
$ 3,000.01 to $ 4,000	4.60	4.80
$ 4,000.01 to $ 5,000	4.85	5.10
$ 5,000.01 to $ 6,000	5.10	5.40
$ 6,000.01 to $ 7,000	5.35	5.70
$ 7,000.01 to $ 8,000	5.60	6.00
$ 8,000.01 to $ 9,000	5.85	6.30
$ 9,000.01 to $10,000	6.10	6.60
$10,000.01 to $11,000	6.35	6.90
$11,000.01 to $12,000	6.60	7.20
$12,000.01 to $13,000	6.85	7.50
$13,000.01 to $14,000	7.10	7.80
$14,000.01 to $15,000	7.35	8.10
$15,000.01 to $16,000	7.60	8.40
$16,000.01 to $17,000	7.85	8.70
$17,000.01 to $18,000	8.10	9.00
$18,000.01 to $19,000	8.35	9.30
$19,000.01 to $20,000	8.60	9.60
$20,000.01 to $21,000	8.85	9.90
$21,000.01 to $22,000	9.10	10.20
$22,000.01 to $23,000	9.35	10.50
$23,000.01 to $24,000	9.60	10.80
$24,000.01 to $25,000	9.85	11.10
$25,000 to $1,000,000	$9.85 Plus handling charge of 25 cents per $1,000 or fraction over first $25,000	$11.10 Plus handling charge of 25 cents per $1,000 or fraction over first $25,000
$1,000,000 to $15,000,000	$253.60 Plus handling charge of 20 cents per $1,000 or fraction over first $1,000,000	$254.85 Plus handling charge of 20 cents per $1,000 or fraction over first $1,000,000
Over $15,000,000	Additional charges may be made based on considerations of weight, space and value.	

APPENDIX ONE

SCHEDULE E-13

Special Services: Restricted Delivery

Description	Fees (in addition to postage)
Per Piece	$1.00

SCHEDULE E-14

Special Services: Return Receipts

Description	Fees (in addition to postage)
Requested at time of mailing	
Showing to whom (signature) and date delivered	$0.60
Showing to whom (signature), date, and address where delivered	0.70
Requested after mailing	
Showing to whom and date delivered	3.75

SCHEDULE E-15

Special Services: Second-Class Applications

Type	Fees
Original Entry	$160
New Agents	30
Re-entry	30
Additional Entry (all zones)	50

SCHEDULE E-16

Special Services: Special Delivery

Class/Weight	Fees (in addition to postage)
First-Class and Priority Mail	
Not more than 2 pounds	$2.10
Over 2 but not over 10 pounds	2.35
Over 10 pounds	3.00
All Other Classes	
Not more than 2 pounds	2.35
Over 2 but not over 10 pounds	3.00
Over 10 pounds	3.40

SCHEDULE E-17

Special Services: Special Handling

Weight	Fees (in addition to postage)
Not more than 10 pounds	$0.75
Over 10 pounds	1.30

SCHEDULE E-18

Special Services: Stamped Envelopes

Type	Price
Single Sale	$0.04
Bulk (500) #6-3/4 size	
Regular	5.85
Window	6.35
Precancelled	5.85
Bulk (500) #10 size	
Regular	6.85
Window	7.35
Precancelled	6.85
Printing Charge Per 500 Envelopes	
Minimum Order (500)	3.00
Order for 1,000 or more	3.00

SCHEDULE E-19

Special Services: Zip Coding of Mailing Lists

Description	Fee
Per Thousand Addresses	$33

SCHEDULE E-20

Special Services: Correction of Mailing Lists

Description	Fee
Per Correction of Addresses	$0.13

APPENDIX ONE

SCHEDULE E-21

Special Services: Address Changes For Election Boards and Registration Commissions

Description	Fee
Per change of address	$0.13

Schedule F

CHANGES IN THE DOMESTIC MAIL CLASSIFICATION SCHEDULE

The language which is italicized [underlined] denotes additions to the Domestic Mail Classification language, and that which is lined out denoted deletions.

100.04 Preparation of Mail

100.040 Postage must be paid as set forth in section 3000 of the General Terms and Conditions.

100.041 First-class mail mailed under section 100.022 must be presorted in accordance with regulations prescribed by the Postal Service.

100.042 First-class mail mailed under section 100.022 must be prepared as follows:

a. All pieces in a mailing must be presented in a manner specified by the Postal Service that preserves the presort and uniform orientation of the pieces.

b. All pieces in a mailing must bear markings identifying them as presorted first-class mail, as required by the Postal Service.

100.0421 Pieces not within the same postage rate increment may be mailed as presorted mail only when specified methods approved by the Postal Service for ascertaining and verifying postage are followed.

100.043 Postal and post cards with any of the following four characteristics are not mailable unless prepared as prescribed by the Postal Service:

a. Numbers or letters unrelated to postal purposes appearing on the address side of the card;

b. Punched holes;

c. Vertical tearing guide;

d. An address portion which is smaller than the remainder of the card.

U.S. Postal Service
Domestic Mail Classification Schedule

100.044 Two or more individuals or firms, or a party acting as an agent for two or more individuals or firms, may not mail in one envelope to a mutual addressee the bills, statements of account or other letters of the individuals or firms, unless the envelope is endorsed as prescribed by the Postal Service and sufficient postage is paid at the first-class rate on each such letter.

Effective:

	Rate Schedule
a. Regular	100
b. Postal and post cards	101
c. Presorted	102
d. Zone rated (priority)	103
e. Fees	1000

100.091 Postage on first-class mail is computed separately on each piece of mail, except for combined mutual mailings as set forth in section 100.044.

100.10 AUTHORIZATION AND LICENSES

100.100 A presorted mailing fee as set forth in Rate Schedule 1000 must be paid once each calendar year at each office of mailing by or for any person who mails presorted mail. Any person who engages a business concern or other individual to mail presorted mail for him must pay the fee.

EFFECTIVE:

200.01 DEFINITION

200.010 Second-class mail is mailable matter consisting of newspapers and other periodical publications which meet the qualifications listed in sections 200.0101 through 200.0109, *or 200.0110.*

200.0101 Second-class matter must be regularly issued at stated intervals at least four times a year, bear a date of issue, and be numbered consecutively.

200.0102 Second-class matter must have a known office of publication. A known office of publication is a public office where business of the publication is transacted during the usual business hours. The office must be maintained where the publication is authorized original second-class entry.

200.0103 Second-class matter must be formed of printed sheets. They may not be reproduced by stencil, mimeograph, or hectograph processes, or reproduced in imitation of typewriting. Reproduction by any other printing process is permissible. Any style of type may be used.

200.0104 Second-class matter must be originated and published for the purpose of disseminating information of a public character, or devoted to literature, the sciences, art, or some special industry.

200.0105 Second-class matter must have a legitimate list of persons who have subscribed by paying or promising to pay at a rate above nominal for copies to be received during a stated time, *with such exception, as enumerated in section 200.0110.*

a. Nominal rate means:

i. A token subscription price that is so low that it cannot be considered a material consideration;

ii. A reduction to the subscriber, under a premium offer or any other arrangements, of more than 50 percent of the amount charged at the basic annual rate for a subscriber to receive one copy of each issue published during the subscription period. The value of a premium is

200.0107 Second-class matter published by an institution or society identified in sections 200.0106h through k, may contain advertising of other persons, institutions, or concerns, only under the following conditions:

a. The publication must be originated and published to further the objectives and purposes of the society;

b. Circulation must be limited to:

i. Copies mailed to members who pay either as a part of their dues or assessment or otherwise, not less than 50 percent of the regular subscription price;

ii. Other actual subscribers;

iii. Exchanges; and,

iv. 10 percent of the total above as sample copies.

200.0108 Second-class matter issued by state departments of agriculture may not contain advertising and must be published for the purpose of furthering the objects of the departments.

200.0109 Foreign newspapers and other periodicals of the same general character as domestic publications entered as second-class mail may be accepted on application of the publishers thereof or their agents, for transmission through the mail at the same rates as if published in the United States. This section does not authorize the transmission through the mail of a publication which violates a copyright granted by the United States.

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

200.0110 Notwithstanding section 200.0101 through 200.0109, publications which meet all the following criteria are second-class mailable matter.

a. Must contain at least 24 pages;

b. Must be issued at regular intervals at least four times a year;

c. Must not be owned or controlled by one or more individuals or business concerns and conducted as an auxiliary to and essentially for the advancement of the main business or calling of those who own or control them;

d. Must devote at least 25 percent of their pages to nonadvertising and not more than 75 percent to advertisements;

e. May be circulated free or mainly free;

f. Must have a legitimate list of persons who request the publication; 50 percent or more of the copies of the publication must be distributed to persons making such requests. Subscription copies paid for or promised to be paid for including those at or below a nominal rate may be included in the determination of whether the 50 percent request requirement is met. Persons will not be deemed to have requested the publication if their request is induced by a premium offer or by receipt of material consideration, provided that mere receipt of the publication is not material consideration. This subsection will not be effective prior to March 20, 1982;

g. Must have a known office of publication. A known office of publication is a public office where business of the publication is transacted during the usual business hours. The office must be maintained where the publication is authorized original second-class entry.

200.011 The term "periodical publications" includes but is not limited to:

a. Any catalog or other course listing including mail announcements of legal texts which are part of post-bar admission education issued by any institution of higher education or by a nonprofit organization engaged in continuing legal education.

b. Any looseleaf page or report (including any index, instruction for filing, table, or sectional identifier which is an integral part of such report) which

EFFECTIVE:

is designed as part of a looseleaf reporting service concerning developments in the law or public policy.

200.012 Publications designed primarily for advertising purposes, free circulation, or circulation at nominal rates (see 200.0105) do not qualify for second-class privileges. *This section and its subsections shall not apply to publications qualifying for second-class privileges under § 200.0110.*

200.0121 Publications "designed primarily for advertising purposes" means publications which:

a. have advertising in excess of 75 percent in more than one-half of their issues during any 12-month period;

b. are owned or controlled by individuals or business concerns and conducted as an auxiliary to and essentially for the advancement of the main business or calling of those who own or control them;

c. consist principally of advertising and editorial write-ups of the advertisers;

d. consist principally of advertising and that have only a token list of subscribers, the circulation being mainly free;

e. have only a token list of subscribers and that print advertisements free for advertisers who pay for copies to be sent to a list of persons furnished by the advertisers; or

f. are published under a license from individuals or institutions and that feature other businesses of the licensor.

200.0122 Designed primarily for free circulation is defined as distribution of 50 percent or more of the copies of a publication for free or at a nominal rate. Copies mailed to persons who are not on a legitimate list of subscribers as set forth in sections 200.0105 *and 200.0110* are free copies.

200.013 Second class mail may contain enclosures and supplements as prescribed by the Postal Service. It may not contain writing, printing or sign thereof or therein, in addition to the original print, except as authorized by the Postal Service.

EFFECTIVE:

200.02 DESCRIPTION OF SUBCLASSES

200.0201 *Regular*

Regular second-class mail is all second-class mail except that to which sections 200.021 and 200.022 apply.

a) Regular second-class may be mailed only by publishers or registered news agents.

b) *Nonsubscriber and nonrequester copies* mailed at any time during the calendar year up to 10 percent of the total weight of copies mailed to subscribers *and requesters* during the calendar year are regular second-class mail provided that the *nonsubscriber and nonrequester* copies would have been regular second-class mail if mailed to subscribers *or requesters.* See *Section 200.093* for mailings in excess of the 10 percent limitation.

200.021 *Preferred*

The preferred subclasses, except Science of Agriculture publications, will receive newspaper treatment under the eligibility conditions established by the Postal Service.

200.0211 Within County

Within-county mail is second-class mail, *other than matter mailed under section 200.0110,* mailed in, and addressed for, delivery within the county where published and originally entered, from either the office of original entry or additional entry.

200.02111 For the purpose of the application of section 200.0211, when a publication has original entry at

an independent incorporated city which is situated entirely within a county or which is contiguous to one or more counties in the same state, such incorporated city shall be considered to be within the county with which it is principally contiguous. Where more than one county is involved, the publisher will select the principal county.

Effective:

200.0212 Nonprofit

Nonprofit mail is second-class mail, *other than matter mailed under section 200.0110,* entered by authorized nonprofit organizations or associations of the following types:

a. religious,

b. educational,

c. scientific,

d. philanthropic,

e. agricultural,

f. labor,

g. veterans,

h. fraternal,

and

i. associations of rural electric cooperatives,

j. one publication, which contains no advertising published by the official highway or development agency of a state,

k. program announcements or guides published by an educational radio or television agency of a state or political subdivision thereof or by a nonprofit educational radio or television station.

l. one conservation publication published by an agency of a state which is responsible for management and conservation of the fish or wildlife resources of such state.

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

200.02121 Nonprofit organizations or associations are organizations or associations not organized for profit, none of the net income of which benefits any private stockholder or individual, and which meet the qualifications set forth below for each type of organization or association. The standard of primary purpose applies to organizations listed under section 200.0212 a through f. The standard of primary purpose requires that each type of organization or association be both organized and operated for the primary purpose.

EFFECTIVE:

iv. Is comprised of members who are elected to membership by vote of the members.

200.0213 Classroom

Classroom mail is second-class mail, *other than matter mailed under section 200.0110,* consisting of religious, education, or scientific publications designed specifically for use in school classrooms or religious instruction classes.

200.0214 Science of Agriculture

Science of agriculture mail is second-class mail, *other than matter mailed under section 200.0110,* consisting of any publication devoted to the science of agriculture if the total number of copies of the publication furnished during any 12-month period to subscribers residing in rural areas amounts to at least 70 percent of the total number of copies distributed by any means for any purpose.

200.0215 Limited Circulation

Limited Circulation mail is second-class mail, other than matter mailed under sections 200.0212, and 200.0213 *or 200.0110,* consisting of a mailing of fewer than five thousand copies per issue outside the county of publication.

200.0216 Preferred mail (200.021) may be mailed only by publishers or registered news agents.

200.0217 *Nonsubscriber copies* mailed at any time during the calendar year up to 10 percent of the total weight of copies mailed to subscribers during the calendar year are preferred mail, provided that the *non-*

subscriber copies would have been preferred mail if mailed to subscribers. See Section 200.093 for mailings in excess of the 10 percent limitation.

For §§ 200.0211, 200.0212, 200.0213, and 200.0215, expedited second-class mail is available without additional charge, but only to publications that issue weekly, or more frequently, and consist of news of general interest.

200.022 Transient

Transient mail is second-class mail:

a. mailed by persons other than publishers or registered new agents;

b. mailed by publishers, not as a part of a commingled presorted mailing of subscriber *or requester* copies, to persons who may not be included in the legitimate list of persons as set forth in section 200.0105 *or in section 200.0110, respectively;*

c. which is forwarded or returned.

EFFECTIVE:

200.0221 *Nonsubscribers and nonrequester* copies mailed at any time during the calendar year in excess of 10 percent of the total weight of copies mailed to subscribers *and requesters* during the calendar year, which are not presorted and commingled with subscriber *and requester copies* are transcient mail. The 10 percent limitation for a publication shall be determined on the combined total weight of all copies of that publiaction mailed to subscribers and *requesters* during the calendar year.

200.03 PHYSICAL LIMITATIONS

200.030 There are no maximum size and weight limits for second-class mail.

200.04 PREPARATION OF MAIL

200.040 Postage must be paid as set forth in section 3000 of the General Terms and Conditions.

200.041 Second-class mail must be presorted in accordance with regulations prescribed by the Postal Service.

200.042 First- or third-class mail may be attached to or enclosed with second-class mail if additional postage is paid for the attachment or enclosure as if it had been mailed separately. If postage is not paid at the appropriate first- or third-class rate, the combined piece is subject to the next higher rate which can be applied to the attachment or enclosure. When first- or third-class mail is enclosed with or attached to second-class mail, an appropriate marking must identify the presence and class of the enclosure or attachment.

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

200.043 Second-class mail must be identified as required by the Postal Service.

200.044 *Nonsubscriber and nonrequester copies must be identified as required by the Postal Service.*

200.045 Information relating to periodical publications must be filed with the Postal Service in accordance with 39 U.S.C. § 3685.

200.05 MAIL DEPOSIT

200.050 Second-class mail must be deposited at places designated by the Postal Service.

200.06 [Reserved]

EFFECTIVE:

200.07 FORWARDING AND RETURN

200.070 Undeliverable-as-addressed second-class mail will be, on request of either the addressee or the mailer, forwarded or returned to the mailer; undeliverable-as-addressed combination first- and second-class pieces will be forwarded and undeliverable-as-addressed combined first class and second-class pieces will be returned, as prescribed by the Postal Service. Additional charges when second-class mail is forwarded or returned from one post office to another will be based on the transient rate.

200.08 ANCILLARY SERVICES

200.080 Second-class mail will receive the following additional services upon payment of the appropriate fees:

	Classification Schedule
a. Certificates of mailing are available for transient rate only	SS-4
b. Special delivery	SS-17

APPENDIX ONE

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

Original Page 26
(continued)

200.09 RATES AND FEES

200.090 The rates and fees for second-class mail are set forth as follows:

	Rate Schedule
a. Regular	200
b. Within County	201
c. Nonprofit	202
d. Classroom	203
e. Science of Agriculture	204
f. Limited Circulation	205
g. Science of Agriculture Limited Circulation	206
h. Transient	207
i. Fees	1000

EFFECTIVE:

200.91 For six months after a subscription has expired, second-class mail may be mailed to a former subscriber at the rates that apply to copies mailed to subscribers, if the publisher has attempted during that six months to obtain payment, or a promise to pay, for renewal.

200.092 A publisher may mail one complete copy of each issue to each advertiser in that issue as an advertiser's proof copy at the rates that apply to subscriber *and requester* copies whether the advertiser's proof copy is mailed to the advertiser directly or, instead, to an advertising representative or agent of the publication.

200.093 *Nonsubscriber and nonrequester copies of* any second-class mail mailed at any time during the calendar year, in excess of 10 percent of the total weight of copies mailed to subscribers and requesters during the calendar year which are presorted and commingled with subscriber *or requester* copies are charged the *full rates for regular second-class shown in Rate Schedule 200.* The 10 percent limitation for publication shall be determined on the combined total weight of all copies of that publication mailed to subscribers *and requesters* during the calendar year, *subject to section 200.0217.*

200.094 Complimentary copies of any second-class mail mailed at any time during the calendar year which are presorted and commingled with subscriber copies and charged the rates shown in Rate Schedule 200 for complimentary and excess sample copies presorted and commingled.

U.S. Postal Service
Domestic Mail Classification Schedule

200.10 Authorizations and Licenses

200.100 Prior to mailing at second-class rates *publications* must be authorized for entry as second-class mail by the Postal Service. Each authorized publication will be granted one original entry office where the office of publication is maintained. Additional entry offices may be granted by the Postal Service upon applications. Application for re-entry shall be made whenever there is a change in the publication's title, frequency of issue or office of original entry.

200.101 News agents must register at all post offices at which they mail second-class mail and pay the applicable fee as set forth in Rate Schedule 1000.

200.1011 A news agent is a person or concern engaged in selling two or more second-class publications published by more than one publisher.

200.102 Publications set forth in section 200.0212, 200.0213 and 200.0214, must obtain the Postal Service's authorization to mail at the rates for such publications.

Effective:

Classification Schedule 250
CONTROLLED CLASSIFICATION MAIL

250.01 Definition

250.010 Controlled circulation mail is mailable matter consisting of publications which meet all of the following criteria:

a. Must contain at least 24 pages;

b. Must be issued at regular intervals at least four times a year;

c. Must not be owned or controlled by one or more individuals or business concerns and conducted as an auxiliary to and essentially for the advancement of the main business or earning of those who own or control them;

d. Must devote at least 95 percent of their pages to nonadvertising and not more than 75 percent to advertisements;

e. May be circulated free or mainly free.

250.02 [This section has been left blank.]

250.03 Physical Limitations

250.030 There are no maximum size and weight limits for controlled circulation mail.

250.04 Preparation of Mail

250.040 Postage must be paid as set forth in section 3000 of the General Terms and Conditions.

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

250.041 Controlled circulation mail must be presorted as prescribed by the Postal Service.

250.042 First- or third-class mail may be attached to or enclosed with controlled circulation mark if postage at the appropriate first- or third-class rate is paid for the attachment or enclosure. If postage is not paid at the appropriate first- or third-class rate, the combined piece is subject to the next higher rate which could be applied to the attachment or enclosure. When first- or third-class mail is enclosed with or attached to controlled circulation mail, an appropriate

marking must identify the presence and class of the enclosure or attachment.

250.05 MAIL DEPOSIT

250.050 Controlled circulation mail must be deposited at places designated by the Postal Service.

250.06 SERVICE

250.060 Controlled circulation mail may receive deferred treatment.

250.07 FORWARDING AND RETURN

250.070 Undeliverable-as-addressed controlled circulation mail will, on request of either the addressee or the mailer, be forwarded or returned to the mailer, undeliverable-as-addressed combination first-class and controlled circulation mail will be forwarded and undeliverable-as-addressed combined first-class and controlled circulation may not be returned as presorted by the Postal Service. Additional charges when addressed circulation mail is forwarded or returned from one post office to another will be based on the single-piece third-class rate or the applicable fourth-class rate, according to the weight of the piece.

250.08 ANCILLARY SERVICES

250.080 Controlled circulation mail will receive special delivery service upon payment of the appropriate fees (Classification Schedule SS-17).

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

250.09 RATES

250.00 The rates for controlled circulation mail are set forth in Rate Schedule 250.

250.10 AUTHORIZATION AND LICENSES

250.100 A publication must receive Postal Service authorization at each post office of mailing prior to being entered as controlled circulation mail.

EFFECTIVE:

Classification Schedule 300

THIRD-CLASS MAIL

300.01 DEFINITION

300.010 Third-class mail is mailable matter weighing less than 16 ounces, except:

a. Matter mailed or required to be mailed as first-class mail;

b. Matter entered as second-class mail, except copies sent by a printer to a publisher;

c. Matter entered as controlled circulation mail, and

c. d. Matter mailed under section 400.021 or section 400.022.

300.0101 Circulars and printed matter weighing less than 16 ounces, including printed letters which according to internal evidence are being sent in identical terms to several persons, but which do not have the character of actual or personal correspondence, are third-class mail. Circulars do not lose their character as third-class mail when the date and name of the addressee and of the sender are written thereon, nor by the correction in writing of mere typographical errors. For the purposes of Classification Schedule 300, "printed" does not include reproduction by handwriting or typewriting.

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

300.02 DESCRIPTION OF SUBCLASSES

300.020 *Single Piece*

Single-piece mail is third-class mail not eligible for mailing under sections 300.021 and 300.022.

300.021 *Bulk*

Bulk rate third-class mail consists of mailings or properly prepared and presorted separately addressed pieces of identical size and weight (except as provided in § 300.046) of third-class mail, in quantities of not less than 50 pounds or of 200 or more pieces.

300.0211 Regular

Regular rate bulk mail is third-class bulk mail which is not eligible for mailing under section 300.0212.

EFFECTIVE:

g. Veterans'

A nonprofit organization of veterans of the armed services of the United States, or an auxiliary unit or society of, or a trust or foundation for, any such post or organization.

h. Fraternal

A nonprofit organization which meets all of the following criteria:

i. Has as its primary purpose the fostering of brotherhood and mutual benefits among its members;

ii. Is organized under a lodge or chapter system with a representative form of government;

iii. Follows a ritualistic format; and

iv. Is comprised of members who are elected to membership by vote of the members.

300.02122 An organization authorized to mail at the special bulk third-class rates for qualified non-profit organizations may mail only its own matter at these rates. An organization may not delegate or lend the use of its permit to mail at special third-class rates to any other person, organization or association.

300.022 *Keys and Identification Devices*

Keys and identification devices include keys, identification cards, identification tags, or similar identification devices mailed without cover, and which bear, contain, or have securely attached the name and complete post office address of a person, organization, or concern,

with instructions to return to such addres and a statement guaranteeing the payment of postage due on delivery.

300.023 *Bulk Rate Presort Categories*

Bulk rate mail sent under section 300.021 must meet the conditions of sections 300.0231 or 300.0232 to be eligible for the applicable presort level rate.

300.0230 Required Sortation

Mailers must sort third-class bulk mail as prescribed by the Postal Service. The basic sortation, other than the two described below, pays the "Required Presortation" rate in Rate Schedules 301 and 302.

300.0231 Five Digit Presort Level

Five-digit presort level mailings must contain at least 200 pieces or 50 pounds of five-digit presorted mail prepared in accordance with USPS regulations so as to avoid handling of individual pieces or packages until they reach the five-digit ZIP Code delivery unit.

300.0232 Carrier Route Presort Level

Carrier route presort level mailings must contain at least 200 pieces or 50 pounds of carrier route presorted mail, with at least 10 pieces to each carrier route. The mail must be properly prepared in the manner prescribed by the Postal Service.

300.03 PHYSICAL LIMITATIONS

300.030

a. There is no maximum size for single-piece third-class mail.

b. Except as provided in section 300.030c, the maximum size for mail qualifying for the carrier route presort level is 13.50 inches in length, 11.50 inches in width, and .75 inches in thickness.

c. Merchandise samples with detached labels may be sent at the carrier route presort rate even though their dimensions may exceed the prescribed maxima, if they meet all other requirements of the carrier route presort level and the detached labels do not exceed those dimensions.

d. For bulk mail not presorted to the carrier route level, there is no size limitation.

300.031 Third-class single-piece mail weighing *one* ounce or less is nonstandard if:

a. its aspect ratio does not fall between 1 to 1.3 and 1 to 2.5, inclusive, or

b. it exceed any of the following:

i. 11.5 inches in length,

ii. 6.125 inches in width, or

iii. .25 inch in thickness

300.04 Preparation of Mail

300.040 Postage must be paid as set forth in section 3000 of the General Terms and Conditions.

300.041 Third-class bulk mail must be presorted as prescribed by the Postal Service

300.042 Third-class mail must be identified as required by the Postal Service.

300.043 Third-class may may have the following written additions placed on the wrapper, on a tag or label attached to the outside of the parcel, or inside the parcel, either attached to the article or loose:

a. Marks, numbers, name, or letters descriptive of contents;

b. *Please Do Not Open Until Christmas,* or words of similar import;

c. Instructions and directions for the use of an article in the package;

d. Manuscript dedication of inscription not in the nature of personal correspondence;

e. Marks to call attention to any word or passage in text;

f. Corrections of typographical errors in:

i. Circulars and printed matter: handwritten or typewritten changes or additions in the body of a circular are limited to corrections of actual typographical errors.

ii. Proof sheets: corrections in proof sheets include corrections of typographical and other errors, alterations of text, insertion of new text, marginal instructions to the printer, and rewrites of parts if necessary for correction.

EFFECTIVE:

300.081 Third-class bulk mail will receive the following services upon payment of the appropriate fees:

	Classification Schedule
a. Address correction	SS-1
b. Certificates of mailing indicating that a specified number of pieces have been mailed. Certificates of mailing are not available for third-class bulk rate mail mailed under permit] imprints.	SS-4

300.09 RATES AND FEES

300.090 The rates for third-class mail are set forth as follows:

	Rate Schedule
a. Single piece	300
b. Bulk regular	301

The following matter may be mailed as bulk regular mail:

i. books and catalogs of 24 or more bound pages of which at least 22 are printed;

ii. seeds, cuttings, bulbs, roots, scions, and plants;

iii. all other third-class bulk matter.

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule

Original Page 38
(continued)

c. Bulk nonprofit 302

The following matter may be mailed as bulk nonprofit mail:

i. books and catalogs of 24 or more bound pages of which at least 2 are printed;

EFFECTIVE:

ii. seeds, cuttings, bulbs, roots, scions, and plants;

iii. all other third-class bulk matter.

d. Keys and identification devices 303

e. Fees 1000

300.10 AUTHORIZATIONS AND LICENSES

300.100 A mailing fee as set forth in Rate Schedule 1000 must be paid once each calendar year by mailers of third-class bulk mail.

EFFECTIVE:

Classification Schedule 400

FOURTH-CLASS MAIL

400.01 DEFINITION

400.010 Fourth-class mail is mailable matter weighing 16 ounces or more, except:

a. Matter mailed or required to be mailed as first-class mail;

b. Matter entered as second-class mail, except copies sent by a printer to a publisher;

c. Matter entered as controlled circulation mail;

d. That the 16-ounce minimum weight does not apply to matter mailed under sections 400.021 or 400.022.

400.02 DESCRIPTION OF SUBCLASSES

400.020 *Parcel Post*

Parcel post is fourth-class mail not eligible for mailing under sections 400.021, 400.022, 400.023.

400.0201 Single-piece

Single-piece parcel post mail is fourth-class parcel post mail not eligible for mailing under section 400.0202.

400.0202 Bulk

Bulk parcel post mail is fourth-class parcel post mail consisting of properly prepared and separated single mailings of not less than 300 pieces. Pieces weighing less than 15 pounds and measuring over

84 inches in length and girth combined are not mailable as bulk parcel post. Provision for mailing nonidentical pieces is set forth in section 400.046.

400.0203 Intra-BMC Parcel Post Mail

Parcel post mail is eligible for the intra-BMC rate described in rate schedules 400 and 401 if it originates and destinates in the same BMC or ASF service area, Alaska, Hawaii or Puerto Rico.

400.021 *Special*

Special mail is fourth-class mail consisting of:

a. Books, including books issued to supplement other books, of 24 pages or more, at least 22 of which are printed, consisting wholly of reading matter or scholarly bibliography or reading matter with incidental blank spaces

EFFECTIVE:

Code, for materials enumerated in former § 4554 (a) of title 39 United States Code.

i. Looseleaf pages and binders therefor, consisting of medical information for distribution to doctors, hospitals, medical schools, and medical students.

400.0211 Single piece

Single-piece special mail is special fourth-class mail not mailed under section 400.0212

400.0212 *Special Mail Presort Categories*

Special rate mail sent under section 400.021 must meet the conditions of sections 400.0213 or 400.0214 to be eligible for the applicable presort level rate. Provisions for mailing nonidentical pieces are set forth in section 400.046.

400.0213 Level A Presort

Level A presort mailings must contain at least 500 pieces of identical weight presorted to 5-digit destination ZIP codes. The mail must be properly prepared in a manner prescribed by the Postal Service.

400.0214 Level B Presort

Level B presort mailings must contain at least 500 pieces of identical weight presorted to destination Bulk Mail Centers. The mail must be properly prepared in a manner prescribed by the Postal Service.

400.022 *Library*

a. Matter designated in subsection 400.0222, loaned or exchanged (including cooperative processing by libraries) between:

i. Schools or colleges, or universities;

ii. Public libraries, museums and herbaria, nonprofit religious, educational, scientific, philanthropic, agricultural, labor, veterans' or fraternal organizations or associations, or between such organizations and their members, readers or borrowers.

b. Matter designated in subsection 400.0223, mailed to or from schools, colleges, universities, public libraries, museums and herbaria and to or from nonprofit religious, educational, scientific, philanthropic, agricultural, labor, veterans' or fraternal organizations or associations; or

c. Matter designated in subsection 400.0223, mailed from a publisher or a distributor to a school, college, university or public library.

400.0221 Nonprofit organizations or association are organizations or associations not organized for profit, none of the net income of which benefits any private stockholder or individual, and which meet the qualifications set forth below for each type of organization or association. The standard of primary purpose applies to each type of organization or association, except veterans and fraternal. The standard of primary purpose requires that each type of organization or association be both organized and operated for the primary purpose.

500.07 Forwarding and Return

500.070 When Express Mail is returned, or forwarded locally as prescribed by the Postal Service, there will be no additional charge.

500.08 Rates and Fees

500.080 The rates for Express Mail are set forth in the following rate schedules:

	Rate Schedule
a. Airport-to-Airport	500
b. Programmed	501
c. Regular Post Office-to-Post Office	502
d. Regular Post Office-to-Addressee	503

500.081 Except as provided in Rate Schedules 501, 502 and 503, postage on Express Mail is charged on each piece. For shipments tendered in Express Mail pouches under a service agreement each pouch is a piece.

500.082 Express Mail postage rates are based on zones measured by great circle air miles between the

airport serving the origin facility and the airport serving the destination facility, as follows:

Zone	Miles	
	Greater Than	Up to and Including
1 & 2	0	150
3	150	300
4	300	600
5	600	1000
6	1000	1400
7	1400	1800
8	1800	2400
9	2400	

500.090 *The following services may be obtained in conjunction with mail sent under this classification schedule upon payment of applicable fees;*

	Classification Schedule
a. Return Receipts	*SS-16*

EFFECTIVE:

Classification Schedule SS-6

COLLECT ON DELIVERY SERVICE

6.01 Definition

6.010 Collect on Delivery (C.O.D.) service is a service which allows a mailer to mail an article for which he has not been paid and have the price, the cost of postage and fees, and anticipated or past due charges collected by the Postal Service from the addressee when the article is delivered.

6.02 Description of Service

6.020 C.O.D. service is available for collection of $*400* or less upon the delivery of postage prepaid mail sent under the following classification schedules:

	Classification Schedule
a. First-class mail	100
b. Third-class (single piece only)	300
c. Fourth-class mail	400

6.0201 Service under this schedule is *not* available for:

a. Collection agency purposes;

b. Return of merchandise about which some dissatisfaction has arisen, unless the new addressee has consented in advance to such return;

c. Sending only bills or statements of indebtedness, even though the sender may establish that the addressee has agreed to collection in this manner; however, when the legitimate C.O.D. shipment consisting of merchandise or bill of lading, is being mailed, the balance due on a past or anticipated transaction may be included in the charges on a C.O.D. article, provided the addressee has consented in advance to such action;

d. Parcels containing moving-picture films mailed by exhibitors to moving-picture manufacturers, distributors, or exchanges;

EFFECTIVE:

Classification Schedule SS-8
DOMESTIC POSTAL MONEY ORDERS

8.01 DEFINITION

8.010 Money order service is a service that provides the customer with an instrument for payment of a specified sum of money.

8.02 DESCRIPTION OF SERVICE

8.020 The maximum value for which a domestic postal money order may be purchased is *$500*. There is no limit on the number of money orders which may be purchased at one time, except that the Postal Service may impose temporary restrictions.

8.021 A receipt of purchase is provided at no additional cost.

8.022 The Postal Service will replace money orders that are spoiled or incorrectly prepared, regardless of who caused the error, without charge *if replaced on the date originally issued.*

8.0221 If a replacement money order is issued *after the date of original issue* because the original was spoiled or incorrectly prepared, the applicable money order fee may be collected from the customer.

8.023 Inquiries and/or claims may be filed by the purchaser, payee, or endorsee.

8.03 FEES

8.030 The fees for domestic postal money orders are set forth in Rate Schedule SS-8.

EFFECTIVE:

Classification Schedule SS-9

INSURED MAIL

9.01 DEFINITION

9.010 Insured mail service is a service that provides the mailer with indemnity for loss of, rifling of, or damage to items sent under this classification schedule.

9.02 DESCRIPTION OF SERVICE

9.020 The maximum liability of the Postal Service under this schedule is $*400*.

9.021 Insured mail service is available for mail sent under the following classification schedules:

	Classification Schedule
a. First-class mail, if containing matter which may be mailed as third- or fourth-class mail	100
b. Third-class (single piece only)	300
c. Fourth-class mail	400

9.022 This service is not available for matter offered for sale, addressed to prospective purchasers who have not ordered or authorized their sending. If such matter is received in the mail, payment will not be made for loss, rifling, or damage.

9.023 The mailer is issued a receipt for each item mailed. For items insured for more than $*20*, a receipt of delivery is obtained by the Postal Service.

9.024 For items insured for more than $*20*, a notice of arrival is left at the mailing address when the first attempt at delivery is unsuccessful.

9.025 A claim for complete loss may be filed by the mailer only. A claim for damage or for partial loss may be filed by either the mailer or addressee.

EFFECTIVE:

9.026 Indemnity claims for insured mail must be filed within a specified period of time from the date the article was mailed.

9.027 Additional copies of the original mailing receipt may be obtained by the mailer, upon payment of the applicable fee set forth in Rate Schedule SS-9.

9.03 DEPOSIT OF MAIL

9.030 Insured mail must be deposited in a manner specified by the Postal Service.

9.04 FORWARDING AND RETURN

9.040 By insuring an item, the mailer guarantees forwarding and return postage unless instructions on the piece mailed indicate that it not be forwarded or returned.

9.041 Mail undeliverable as addressed sent under this schedule will be returned to the sender as specified by the sender or by the Postal Service.

9.05 OTHER SERVICES

9.050 The following services, if applicable to the class of mail, may be obtained in conjunction with mail sent

under this classification schedule upon payment of the applicable fees:

	Classification Schedule
a. Parcel Airlift	SS-13
b. Restricted delivery (for items insured for more than $20	SS-15
c. Return receipt (for items insured for more than $20	SS-16
d. Special delivery	SS-17
e. Special handling	SS-18

9.06 FEES

9.060 The fees for insured mail service are set forth in Rate Schedule SS-9.

EFFECTIVE:

U.S. POSTAL SERVICE
Domestic Mail Classification Schedule Original Page 85

13.06 FORWARDING AND RETURN

13.060 PAL mail sent for delivery outside the contiguous 48 states is forwarded as set forth in section 100.03 of the General Terms and Conditions. PAL mail sent for delivery within the contiguous 48 states is forwarded or returned as set forth in sections 300.07 and 400.07 as appropriate.

13.07 OTHER SERVICES

13.070 The following services, if applicable to the class of mail, may be obtained in conjunction with mail sent under this classification schedule upon payment of the applicable fees:

	Classification Schedule
a. Certificate of mailing	SS-4
b. Insured mail	SS-9
c. Restricted delivery (if insured for more than $20	SS-15
d. Return receipt (if insured for more than $20	SS-16
e. Special Delivery (if mailed for delivery within the 48 contiguous states)	SS-17
f. Special handling	SS-18

13.08 FEES

13.080 The fees for parcel airlift service are set forth in Rate Schedule SS-13.

EFFECTIVE:

U.S. Postal Service
Domestic Mail Classification Schedule Original Page 86

Classification Schedule SS-14

REGISTERED MAIL

14.01 Definition

14.010 Registered mail is a service which provides added protection to mail sent under this Domestic Mail Classification Schedule and *optional* indemnity in case of loss or damage.

14.02 Description of Service

14.020 Registered mail service is available to mailers of prepaid mail sent under Classification Schedule 100.

14.021 Registered mail service provides *optional* insurance up to a maximum of *$25,000*.

14.022 There is no limit on the value of articles sent under this classification schedule.

14.023 Registered mail service is not available for:

a. All delivery points because of the high security required for registered mail; in addition, not all delivery points will be available for Registry and liability is limited in some geographic areas.

b. Mail of any class sent in combination with first-class mail;

c. Two or more articles tied or fastened together, unless the envelopes are enclosed in the same envelope or container.

14.024. The following services are provided as part of registered mail service at no additional cost to the mailer;

a. A receipt;

b. A record of delivery, retained by the Postal Service for a specified period of time;

c. A notice of arrival will be left at the mailing address if the initial delivery attempt is unsuccessful;

d. When registered mail is undeliverable-as-addressed and cannot be forwarded, a notice of nondelivery is provided.

14.025 A claim for complete loss *of insured articles* may be filed by the mailer only. A claim for damage or for partial loss *of insured articles* may be filed by either the mailer or addressee.

EFFECTIVE:

14.026 Indemnity claims for registered mail *on which optional insurance has been elected* must be filed within a specified period of time from the date the article was mailed.

14.027 No indemnity is paid on any matter registered free.

14.03 Deposit of Mail

14.030 Registered mail must be deposited in a manner specified by the Postal Service.

14.04 Service

14.040 Registered mail is provided maximum security.

14.05 Forwarding and Return

14.050 Registered mail is forwarded and returned without charge.

14.06 Other Services

14.060 The following services may be obtained in conjunction with mail sent under this classification schedule upon payment of applicable fees:

	Classification Schedule
a. Collect on delivery	SS-6
b. Restricted delivery	SS-15
c. Return receipt	SS-16
d. Special delivery	SS-17

14.07 Fees

14.070 The fees for registered mail and *related optional indemnity purchase* are set forth in Rate Schedules SS-14.

Effective:

Classification Schedule SS-15

RESTRICTED DELIVERY

15.01 Definition

15.010 Restricted delivery service is a service that provides a means by which a mailer may direct that delivery will be made to the addressee or to someone authorized by the addressee to receive his mail.

15.02 Description of Service

15.020 This service is available for mail sent under the following classification schedules:

	Classification Schedule
a. Certified mail	SS-5
b. C.O.D. mail	SS-6
c. Insured mail if insured for more than $20	SS-9
d. Registered mail	SS-14
e. Express mail	SS-16

15.021 Restricted delivery service is available to the mailer at the time of mailing or after mailing.

15.022 Restricted delivery service is available only to natural persons specified by name.

15.023 A record of delivery will be retained by the Postal Service for a specified period of time.

15.024 Failure to provide restricted delivery service when requested after mailing, due to prior delivery, is not grounds for refund of the fee or communications charges.

15.03 Fees

15.030 The fees for restricted delivery service are set forth in Rate Schedule SS-15.

Effective:

Classification Schedule SS-16

RETURN RECEIPTS

16.01 Definition

16.010 Return receipt service is a service which provides evidence to the mailer that an article has been received at the delivery address.

16.02 Description of Service

16.020 Return receipt service is available for mail sent under the following classification schedules:

	Classification Schedule
a. Certified mail	SS-5
b. C.O.D. mail	SS-6
c. Insured mail if insured for more than $20	SS-9
d. Registered mail	SS-14
e. Express mail	SS-16

16.021 Return receipt service is available at the time of mailing or after mailing.

16.0211 Mailers requesting return receipt service at the time of mailing will be provided, as appropriate:

a. The signature of the addressee or his agent and the date delivered, or

b. The signature of the addressee or his agent, the date delivered and the address of delivery.

16.0212 Mailers requesting return receipt service *after mailing* will be provided the date of delivery and the name of the person who signed for the article.

16.022 If the mailer does not receive a return receipt within a specified period of time from the date of mailing, the mailer may request a duplicate return receipt. No fee is charged for a duplicate return receipt.

16.03 FEES

16.030 The fees for return receipt service are set forth in Rate Schedule SS-16.

EFFECTIVE:

PHASED RATES

Appendix Two

APPENDIX TWO

TABLE OF CONTENTS

Schedule 1
Second-Class Phased Rates: In-County

Schedule 2
Second-Class Phased Rates: Publications of Authorized Nonprofit Organizations, Outside County

Schedule 3
Second-Class Phased Rates: Classroom Publications, Outside County

Schedule 4
Second-Class Phased Rates: Regular Rate Publications Outside County

Schedule 5
Third-Class Phased Rates: Nonprofit Bulk

Schedule 6
Fourth-Class Phased Rates: Library

APPENDIX TWO

SCHEDULE 1

Second-Class Phased Rates: In-County

Rate Category	Phased Rates (cents)							
	Year							
	9	10	11	12	13	14	15	16
Pound-Rate Matter:								
Per Pound	3.2	3.5	3.9	4.3	4.7	5.0	5.4	5.8
Per Piece:								
Presorted to Carrier Route	1.6	1.8	2.0	2.3	2.5	2.7	3.0	3.2
Other	1.6	1.9	2.2	2.5	2.8	3.1	3.4	3.7

APPENDIX TWO

SCHEDULE 2

Second-Class Phased Rates: Publications of Authorized Nonprofit Organizations, Outside County

Rate Category	Phased Rates (cents)							
	Year							
	9	10	11	12	13	14	15	16
Editorial	6.3	6.8	7.3	7.9	8.4	8.9	9.5	10.0
Advertising								
1 & 2	9.3	9.8	10.4	11.0	11.6	12.1	12.7	13.3
3	10.0	10.6	11.2	11.9	12.5	13.1	13.7	14.3
4	11.4	12.1	12.7	13.4	14.0	14.7	15.3	16.0
5	13.3	14.1	14.9	15.6	16.4	17.2	17.9	18.7
6	15.0	16.0	16.9	17.8	18.7	19.7	20.6	21.5
7	16.6	17.7	18.9	20.1	21.3	22.4	23.6	24.8
8	18.0	19.4	20.8	22.2	23.6	24.9	26.3	27.7
Pieces								
A	2.8	3.6	4.3	5.0	5.7	6.4	7.1	7.8
B	2.6	3.2	3.7	4.2	4.7	5.2	5.7	6.2
C	2.5	2.9	3.3	3.7	4.1	4.4	4.8	5.2

APPENDIX TWO

SCHEDULE 3

Second-Class Phased Rates: Classroom Publications

Rate Category	Phased Rates (cents)							
	Year							
	9	10	11	12	13	14	15	16
Editorial	4.0	4.4	4.7	5.0	5.4	5.7	6.1	6.4
Advertising								
1 & 2	5.3	5.8	6.3	6.7	7.2	7.7	8.1	8.6
3	6.0	6.5	7.1	7.6	8.1	8.6	9.2	9.7
4	7.3	8.0	8.6	9.2	9.8	10.5	11.1	11.7
5	9.4	10.1	10.9	11.7	12.4	13.2	13.9	14.7
6	11.7	12.6	13.5	14.4	15.3	16.1	17.0	17.9
7	13.6	14.8	15.9	17.0	18.2	19.3	20.5	21.6
8	15.6	16.9	18.3	19.6	20.9	22.2	23.6	24.9
Piece	1.6	1.9	2.1	2.4	2.7	3.0	3.3	3.6

APPENDIX TWO

SCHEDULE 4

Second-Class Phased Rates: Regular Rate Publications Outside County

Science of Agriculture

	Phased Rates (cents)							
Rate Category	Year							
	9	10	11	12	13	14	15	16
Advertising to Zones 1 & 2	9.3	9.9	10.5	11.0	11.6	12.2	12.7	13.3

Limited Circulation

	Phased Rates (cents)							
Rate Category	Year							
	9	10	11	12	13	14	15	16
A	2.7	3.3	3.9	4.5	5.1	5.7	6.3	6.9
B	2.1	2.6	3.0	3.5	3.9	4.4	4.8	5.3
C	2.1	2.5	2.8	3.2	3.6	4.0	4.4	4.8

APPENDIX TWO

SCHEDULE 5

Third-Class Phased Rates: Nonprofit Bulk

	Phased Rates (cents)							
Rate Category	Year							
	9	10	11	12	13	14	15	16

(SEE APPENDIX THREE)

APPENDIX TWO

SCHEDULE 6

Fourth-Class Phased Rates: Library

	Phased Rates (cents)							
Rate Category	Year							
	9	10	11	12	13	14	15	16
First Pound	21.0	25.0	29.0	33.0	37.0	42.0	46.0	50.0
Each Additional Pound Thru 7 Pounds	8.0	9.0	10.0	12.0	13.0	14.0	16.0	17.0
Each Additional Pound	5.0	6.0	6.0	7.0	8.0	8.0	9.0	9.5

Appendix Three

APPENDIX THREE

Third-Class Mail

	Full Rate (cents)
Regular Bulk:	
Per pound	33*
Minimum-per piece:	
Required presortation	10.4
Presorted to 5-digits	8.8
Presorted to carrier-route	6.4
Nonprofit Bulk:	
Per pound	23.4*
Minimum-per-piece:	
Required presortation	5.9
Presorted to 5-digits	5.0
Presorted to carrier-route	4.0

* Less the amount of difference between the minimum-per-piece rates for required presortation and the appropriate presortation level on a per piece basis.

APPENDIX THREE

Third-Class Phased Rates: Nonprofit Bulk

Rate Category	Year							
	9	10	11	12	13	14	15	16
Per pound*	14.0	15.3	16.7	18.0	19.4	20.7	22.1	23.4
Minimum-per-piece								
Required presortation	3.5	3.8	4.2	4.5	4.9	5.2	5.6	5.9
Presorted to 5-digits	3.3	3.6	3.8	4.1	4.3	4.5	4.8	5.0
Presorted to carrier route	3.1	3.2	3.4	3.5	3.6	3.7	3.9	4.0

* Less the amount of difference between the minimum-per-piece rates for required presortation and the appropriate presortation level on a per piece basis.

APPENDIX C

The Postal Reorganization Act,
August 12, 1970, as amended
(84 Stat. 719, *et seq.*; 39 U.S.C. § 101, *et seq.*)

§ 101
§ 201
§ 401
§ 403
§§ 3601-3628

The Postal Reorganization Act, 84 Stat. 719, *et seq.*, as amended 39 U.S.C. § 101, *et seq.*, provides in pertinent part:

§ 101. Postal policy

(a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.

(b) The Postal Service shall provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining. No small post office shall be closed solely for operating at a deficit, it being the specific intent of the Congress than effective postal services be insured to residents of both urban and rural communities.

(c) As an employer, the Postal Service shall achieve and maintain compensation for its officers and employees comparable to the rates and types of compensation paid in the private sector of the economy of the United States. It shall place particular emphasis upon opportunities for career advancements of all officers and employees and the achievement of worthwhile and satisfying careers in the service of the United States.

(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.

(e) In determining all policies for postal services, the Postal Service shall give the highest consideration to the requirement for the most expeditious collection, transportation, and delivery of important letter mail.

(f) In selecting modes of transportation, the Postal Service shall give highest consideration to the prompt and economical delivery of all mail and shall make a fair and equitable distribution of mail business to carriers providing similar modes of transportation services to the Postal Service. Modern methods of transporting mail by containerization and programs designed to achieve overnight transportation to the destination of important letter mail to all parts of the Nation shall be a primary goal of postal operations.

(g) In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities, and control of costs to the Postal Service.

* * * * * * * *

§ 201. United States Postal Service

There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.

* * * * * * * *

§ 401. General Powers of the Postal Service

The Postal Service shall have the following general powers:

(1) to sue and be sued in its official name;

(2) to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title;

(3) to enter into and perform contracts, execute instruments, and determine the character of, and necessity for, its expenditures;

(4) to determine and keep its own system of accounts and the forms and contents of its contracts and other business documents, except as otherwise provided in this title;

(5) to acquire, in any lawful manner, such personal or real property, or any interest therein, as it deems necessary or convenient in the transaction of its business; to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein; and to provide services in connection therewith and charges therefor;

(6) to construct, operate, lease, and maintain buildings, facilities, equipment, and other improvements on any property owned or controlled by it, including, without limitation, any property or interest therein transferred to it under section 2002 of this title;

(7) to accept gifts or donations of services or property, real or personal, as it deems necessary or convenient in the transaction of its business;

(8) to settle and compromise claims by or against it;

(9) to exercise, in the name of the United States, the right of eminent domain for the furtherance of its official purposes; and to have the priority of the United States with respect to the payment of debts out of bankrupt, insolvent, and decedents' estates; and

(10) to have all other powers incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers.

§ 403. General duties

(a) The Postal Service shall plan, develop, promote, and provide adequate and efficient postal services at fair and

reasonable rates and fees. Except as provided in the Canal Zone Code, the Postal Service shall receive, transmit, and deliver throughout the United States, its territories and possessions, and, pursuant to arrangements entered into under sections 406 and 411 of this title, throughout the world, written and printed matter, parcels, and like materials and provide such other services incidental thereto as it finds appropriate to its functions and in the public interest. The Postal Service shall serve as nearly as practicable the entire population of the United States.

(b) It shall be the responsibility of the Postal Service—

(1) to maintain an efficient system of collection, sorting, and delivery of the mail nationwide;

(2) to provide types of mail service to meet the needs of different categories of mail and mail users; and

(3) to establish and maintain postal facilities of such character and in such locations that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services.

(c) In providing services and in establishing classifications, rates, and fees under this title, the Postal Service shall not, except as specifically authorized in this title, make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user.

* * * * * * * *

CHAPTER 36.—POSTAL RATES, CLASSES, AND SERVICES

SUBCHAPTER I—POSTAL RATE COMMISSION

SEC.
3601. Establishment.
3602. Terms of office.

3603. Rules; regulations; procedures.
3604. Administration.

SUBCHAPTER II—PERMANENT RATES AND CLASSES OF MAIL

3621. Authority to fix rates and classes.
3622. Rates and fees.
3623. Mail classification.
3624. Recommended decisions of Commission.
3625. Action of the Governors.
3626. Reduced rates.
3627. Adjusting free and reduced rates.
3628. Appellate review.

SUBCHAPTER III—TEMPORARY RATES AND CLASSES

3641. Temporary changes in rates and classes.

SUBCHAPTER IV—POSTAL SERVICES AND COMPLAINTS

3661. Postal services.
3662. Rate and service complaints.

SUBCHAPTER V—GENERAL

3681. Reimbursement.
3682. Size and weight limits.
3683. Uniform rates for books; films; other materials.
3684. Limitations.
3685. Filing of information relating to periodical publications.

SUBCHAPTER I—POSTAL RATE COMMISSION

§ 3601. Establishment

(a) The Postal Rate Commission is an independent establishment of the executive branch of the Government of the United States. The Commission is composed of 5 Commissioners, appointed by the President, by and with the

advice and consent of the Senate. The Commissioners shall be chosen on the basis of their professional qualifications and may be removed by the President only for cause. Not more than 3 of the Commissioners may be adherents of the same political party.

(b) A Commissioner may continue to serve after the expiration of his term until his successor has qualified, except that a Commissioner may not so continue to serve for more than 1 year after the date upon which his term otherwise would expire under section 3602 of this title.

(c) One of the Commissioners shall be designated as Chairman by, and shall serve in the position of Chairman at the pleasure of, the President.

(d) The Commissioners shall by majority vote designate a Vice Chairman of the Commission. The Vice Chairman shall act as Chairman of the Commission in the absence of the Chairman.

(Amended Pub. L. 94-421, § 3, Sept. 24, 1976, 90 Stat. 1304.)

§ 3602. Terms of office

The Commissioners of the Postal Rate Commission shall serve for terms of 6 years except that—

(1) the terms of the Commissioners first taking office shall expire as designated by the President at the time of appointment, 1 at the end of 2 years, 2 at the end of 4 years, and 2 at the end of 6 years, following the appointment of the first of them; and

(2) any Commissioner appointed to fill a vacancy occurring before the expiration of the term for which his predecessor was appointed shall serve for the remainder of such term.

§ 3603. Rules; regulations; procedures

The Postal Rate Commission shall promulgate rules and regulations and establish procedures, subject to chapters 5 and 7 of title 5, and take any other action they deem necessary and proper to carry out their functions and obligations to the Government of the United States and the people as prescribed under this chapter. Such rules, regulations, procedures, and actions shall not be subject to any change or supervision by the Postal Service.

§ 3604. Administration

(a) The Chairman of the Postal Rate Commission shall be the principal executive officer of the Commission. The Chairman shall exercise or direct the exercise of all the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment of personnel employed under the Commission, except that the appointment of heads of major administrative units under the Commission shall require the approval of a majority of the members of the Commission, (2) the supervision of the personnel employed under the Commission and the distribution of business among them and among the Commissioners and (3) the use and expenditure of funds.

(b) In carrying out any of his functions under this section, the Chairman shall be governed by the general policies of the Commission.

(c) The Chairman may obtain such facilities and supplies as may be necessary to permit the Commission to carry out its functions. Any officer or employee appointed under this section shall be paid at rates of compensation and shall be entitled to programs offering employee benefits established under chapter 10 or chapter 12 of this title, as appropriate.

(d)(1) The Commission shall periodically prepare and submit to the Postal Service a budget of the Commission's expenses, including, but not limited to, expenses for facilities, supplies, compensation, and employee benefits. The budget shall be considered approved—

(A) as submitted if the Governors fail to act in accordance with subparagraph (B) of this paragraph; or

(B) as adjusted if the Governors holding office, by unanimous written decision, adjust the total amount of money requested in the budget.

Subparagraph (B) shall not be construed to authorize the Governors to adjust any item included within the budget.

(2) Expenses incurred under any budget approved under paragraph (1) of this subsection shall be paid out of the Postal Service fund established under section 2003 of this title.

(e) The provisions of section 410 and chapter 10 of this title shall apply to the Commission, as appropriate. (Amended Pub. L. 94-421, § 4, Sept. 24, 1976, 90 Stat. 1305.)

SUBCHAPTER II—PERMANENT RATES AND CLASSES OF MAIL

§ 3621. Authority to fix rates and classes

Except as otherwise provided, the Governors are authorized to establish reasonable and equitable classes of mail and reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of this chapter. Postal rates and fees shall be reasonable and equitable and sufficient to enable the Postal Service under honest, efficient, and economical management to maintain and continue the development of postal services of the kind and quality adapted to the needs of the United States.

Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service. For purposes of this section, "total estimated costs" shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies.

§ 3622. Rates and fees

(a) From time to time the Postal Service shall request the Postal Rate Commission to submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal services if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of this title. The Postal Service may submit such suggestions for rate adjustments as it deems suitable.

(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of

all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matters at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

(Amended Pub. L. 94-421, § 10, Sept. 24, 1976, 90 Stat. 1311.)

§ 3623. Mail classification

(a) Within 2 years after the effective date of this subchapter, the Postal Service shall request the Postal Rate Commission to make a recommended decision on establishing a mail classification schedule in accordance with the provisions of this section.

(b) Following the establishment of the mail classification schedule requested under subsection (a) of this section, the Postal Service may from time to time request that the Commission submit, or the Commission may submit to

the Governors on its own initiative, a recommended decision on changes in the mail classification schedule.

(c) The Commission shall make a recommended decision on establishing or changing the schedule in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable classification system for all mail;

(2) the relative value to the people of the kinds of mail matter entered into the postal system and the desirability and justification for special classifications and services of mail;

(3) the importance of providing classifications with extremely high degrees of reliability and speed of delivery;

(4) the importance of providing classifications which do not require an extremely high degree of reliability and speed of delivery;

(5) the desirability of special classifications from the point of view of both the user and of the Postal Service; and

(6) such other factors as the Commission may deem appropriate.

(d) The Postal Service shall maintain one or more classes of mail for the transmission of letters sealed against inspection. The rate for each such class shall be uniform throughout the United States, its territories, and possessions. One such class shall provide for the most expeditious handling and transportation afforded mail matter by the Postal Service. No letter of such a class of domestic origin shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered,

or pursuant to the authorization of the addressee. (Amended Pub. L. 94-421, § 8, Sept. 24, 1976, 90 Stat. 1310.)

§ 3624. Recommended decisions of Commission

(a) The Postal Rate Commission shall promptly consider a request made under section 3622 or 3623 of this title, except that the Commission shall not recommend a decision until the opportunity for a hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mails, and an officer of the Commission who shall be required to represent the interests of the general public.

(b) In order to conduct its proceedings with utmost expedition consistent with procedural fairness to the parties, the Commission may (without limitation) adopt rules which provide for—

(1) the advance submission of written direct testimony;

(2) the conduct of prehearing conferences to define issues, and for other purposes to insure orderly and expeditious proceedings;

(3) discovery both from the Postal Service and the parties to the proceedings;

(4) limitation of testimony; and

(5) the conduct of the entire proceedings off the record with the consent of the parties.

(c)(1) Except as provided by paragraph (2) of this subsection in any case in which the Postal Service makes a request under section 3622 of this title for a recommended decision by the Commission on changes in a rate or rates of postage or in a fee or fees for postal services the Commission shall transmit its recommended decision to the Governors under subsection (d) of this section no later

than 10 months after receiving any such request from the Postal Service.

(2) In any case in which the Commission determines that the Postal Service has unreasonably delayed consideration of a request made by the Postal Service under section 3622 by failing to respond within a reasonable time to any lawful order of the Commission, the Commission may extend the 10-month period described in paragraph (1) of this subsection by one day for each day of such delay.

(d) The Commission shall transmit its recommended decision in a rate, fee, or classification matter to the Governors. The recommended decision shall include a statement specifically responsive to the criteria established under section 3622 or 3623, as the case may be. (Amended Pub. L. 94-421, § 5(a), Sept. 24, 1976, 90 Stat. 1306.)

§ 3625. Action of the Governors

(a) Upon receiving a recommended decision from the Postal Rate Commission, the Governors may approve, allow under protest, reject, or modify that decision in accordance with the provisions of this section.

(b) The Governors may approve the recommended decision and order the decision placed in effect.

(c) The Governors may, under protest, allow a recommended decision of the Commission to take effect and (1) seek judicial review thereof under section 3628 of this title, or (2) return the recommended decision to the Commission for reconsideration and a further recommended decision, which shall be acted upon under this section and subject to review in accordance with section 3628 of this title.

(d) The Governors may reject the recommended decision of the Commission and the Postal Service may resubmit its request to the Commission for reconsideration. Upon resubmission, the request shall be reconsidered, and a further recommended decision of the Commission shall be acted

upon under this section and subject to review in accordance with section 3268 of this title. However, with the unanimous written concurrence of all of the Governors then holding office, the Governors may modify any such further recommended decision of the Commission under this subsection if the Governors expressly find that (1) such modification is in accord with the record and the policies of this chapter, and (2) the rates recommended by the Commission are not adequate to provide sufficient total revenues so that total estimated income and appropriations will equal as nearly as practicable estimated total costs.

(e) The decision of the Governors to approve, allow under protest, reject, or modify a recommended decision of the Commission shall be in writing and shall include an estimate of anticipated revenue and a statement of explanation and justification. The decision, the record of the Commission's hearings, and the Commission's recommended decision shall be made generally available at the time the decision is issued and shall be printed and made available for sale by the Public Printer within 10 days following the day the decision is issued.

(f) The Board shall determine the date on which the new rates, fees, the mail classification schedule, and changes in such schedule under this subchapter shall become effective.

§ 3626. Reduced rates

(a) If the rates of postage for any class of mail or kind of mailer under former sections 4358, 4359, 4421, 4422, 4452, or 4554 of this title, as such rates existed on the effective date of this subchapter, are, on the effective date of the first rate decision under this subchapter affecting that class or kind, less than the rates established by such decision, a separate rate schedule shall be adopted for that class or kind effective each time rates are established or changed

under this subchapter, with annual increases as nearly equal as practical, so that—

(1) the revenues received from rates for mail under former sections 4358, 4452 (b) and (c), and 4554 (b) and (c) shall not, on and after the first day of the sixteenth year following the effective date of the first rate decision applicable to that class or kind, exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service);

(2) the rates for mail under former sections 4359, 4421, 4422, and 4554(a) shall be equal, on and after the first day of the eighth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subsection had not been enacted; and

(3) the rates for mail under former section 4452(a) shall be equal, on and after the first day of the fifth year following the effective date of the first rate decision applicable to that class or kind, to the rates that would have been in effect for such mail if this subparagraph had not been enacted.

No person who would have been entitled to mail matter under former section 4359 of this title shall mail such matter at the rates provided under this subparagraph unless he files annually with the Postal Service a written request for permission to mail matter at such rates.

(b)(1) For the purposes of this title, the term "periodical publications", as used in former section 4351 of this title, includes (A) any catalog or other course listing, including mail announcements of legal texts which are part of post-bar admission education issued by any institution of higher education or by a nonprofit organization engaged in continuing legal education; and (B) any looseleaf page

or report (including any index, instruction for filing, table, or sectional identifier which is an integral part of such report) which is designed as part of a looseleaf reporting service concerning developments in the law or public policy.

(2) Any material described in paragraph (1) of this subsection shall qualify to be entered and mailed as second class mail in accordance with the applicable provisions of former section 4352 through former section 4357 of this title.

(3) For purposes of this subsection, the term "institution of higher education" has the meaning given it by section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)).

(c) In the administration of this section, one conservation publication published by an agency of a State which is responsible for management and conservation of the fish or wildlife resources of such State shall be considered a publication of a qualified nonprofit organization which qualifies for rates of postage under former section 4358(d) of this title.

(d)(1) For purposes of this title, the term "agricultural", as used in former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, includes the art or science of cultivating land, harvesting crops or marine resources, or raising of livestock.

(2) In the administration of this section, and for purposes of former sections 4358(j)(2), 4452(d), and 4554(b)(1)(B) of this title, agricultural organizations or associations shall include any organization or association which collects and disseminates information or materials relating to agricultural pursuits.

(Amended Pub. L. 93-28, § 1, June 30, 1974, 88 Stat. 287; Pub. L. 94-421, § 11, Sept. 24, 1976, 90 Stat. 1311.)

§ 3627. Adjusting free and reduced rates

If Congress fails to appropriate an amount authorized under section 2401(c) of this title for any class of mail sent at a free or reduced rate under section 3217, 3403-3405, or 3626 of this title, or under the Federal Voting Assistance Act of 1955, the rate for that class may be adjusted in accordance with the provisions of this subchapter so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate.

§ 3628. Appellate review

A decision of the Governors to approve, allow under protest, or modify the recommended decision of the Postal Rate Commission may be appealed to any court of appeals of the United States, within 15 days after its publication by the Public Printer, by an aggrieved party who appeared in the proceedings under section 3624(a) of this title. The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Commission and the Governors. The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not modify the decision. The court shall make the matter a preferred cause and shall expedite judgment in every way. The court may not suspend the effectiveness of the changes, or otherwise prevent them from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a decision made by the Commission or Governors under this chapter except as provided in this section.

Joint Appendix

Office - Supreme Court, U.S.
FILED
JUL 2 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304, 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*

Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC,

Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*

Respondents.

JOINT APPENDIX

MATTHEW S. PERLMAN
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
Counsel for the National Association of Greeting Card Publishers

BERNARD G. SEGAL
ROBERT L. KENDALL, JR.
JOHN E. MCKEEVER
SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, PA 19102
Counsel for United Parcel Service of America, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

DANA TODD ACKERLY
CHARLES LISTER
DAVID K. FLYNN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
Counsel for Direct Mail/ Marketing Association, Inc.

WILLIAM R. CONNOLE
EUGENE E. THREADGILL
CONNOLE & O'CONNELL
One Farragut Square South
Washington, D.C. 20006
Counsel for Council of Public Utility Mailers

REX E. LEE
SOLICITOR GENERAL
JOHN H. GARVEY
ASSISTANT TO SOLICITOR GENERAL
Department of Justice
Room 5143
10th and Constitution Avenue, N.W.
Washington, D.C. 20530
Counsel for United States Postal Service

JOHN M. BURZIO
HYDEMAN, MASON, BURZIO & LLOYD
Suite 700
1220 19th Street, N.W.
Washington, D.C. 20036
Counsel for Time, Inc. and Magazine Publishers Association, Inc.

TONI K. ALLEN
ROBERT M. LICHTMAN
WALD, HARKRADER & ROSS
1300 19th Street, N.W.
Washington, D.C. 20036
Counsel for Newsweek, Inc.

ALAN R. SWENDIMAN
JACKSON, CAMPBELL & PARKINSON
Suite 300 South
1220 20th Street, N.W.
Washington, D.C. 20036

WILLIAM J. OLSON
SMILEY OLSON & GILMAN
1819 H Street, N.W.
Washington, D.C. 20006
Counsel for March of Dimes Birth Defects Foundation, The National Wildlife Federation, American Lung Association, National Easter Seal Society, St. Jude Children's Research Hospital, American Cancer Society

ROBERT A. SALTZSTEIN
STEPHEN M. FELDMAN
WYATT, SALTZSTEIN, LIPSEN & HAMBERGER
8th Floor
1725 DeSales Street, N.W.
Washington, D.C. 20036
Counsel for American Business Press

RICHARD M. SCHMIDT, JR.
IAN D. VOLNER
BRIAN M. MADDEN
COHN & MARKS
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for Association of American Publishers, Inc. and Recording Industry Association of America, Inc.

DAVID C. TODD
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
Counsel for Mail Order Association of America

TIMOTHY J. MAY
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
Counsel for Parcel Shippers Association and The Reader's Digest Association, Inc.

RAYMOND N. SHIBLEY
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for Dow Jones & Company, Inc.

CHARLES EMMET LUCEY
GARY L. RYAN
MCDERMOTT, WILL & EMERY
Suite 500
1850 K Street, N.W.
Washington, D.C. 20006
Counsel for International Labor Press Association, AFL-CIO/CLC and Warshawsky & Company

TABLE OF CONTENTS

Page

Testimony Of USPS Witness Alenier

Direct

R. 21317-54 ..... 1a

R. 21518 ..... 24a

Cross

R. 5739-40 ..... 27a

R. 6358-65 ..... 27a

R. 6676-77 ..... 34a

R. 6797-98 ..... 35a

Response Of USPS To Question Of Presiding Officer To Witness Alenier 37a

Testimony Of USPS witness Allen

Direct

R. 22005-06 ..... 40a

R. 22026 ..... 41a

R. 22038-39 ..... 42a

R. 22122 ..... 43a

R. 22174-75 ..... 45a

R. 22178 ..... 46a

Cross

R. 3738 ..... 47a

R. 3832-40 ..... 47a

R. 3983-85 ..... 54a

Testimony Of USPS Witness Dalton

Direct

R. 21620-21 ..... 57a

R. 21685-86 ..... 59a

R. 21688-91 ..... 64a

Testimony Of USPS Witness Heselton

Rebuttal

R. 17500-11 ..... 73a

Table of Contents Continued

Page

Cross
R. 17638-40 ..... 82a
R. 17646-47 ..... 84a
R. 17724-25 ..... 85a
R. 17734-35 ..... 87a
Testimony Of USPS Witness Martin
Direct
R. 21270-71 ..... 89a
Testimony Of USPS Witness Merewitz
Direct
R. 21934 ..... 91a
R. 21947 ..... 91a
Testimony Of USPS Witness Robers
Rebuttal
R. 18131-33 ..... 93a
Testimony Of USPS Witness Steger
Rebuttal
R. 17347-50 ..... 95a
R. 17367-96 ..... 98a
Testimony Of ANPA Witness Miller
Rebuttal
R. 18949-55 ..... 123a
Testimony Of Dow Jones Witness Harris
Direct
R. 19539-46 ..... 129a
Testimony Of Dow Jones Witness King
Direct
R. 8143 ..... 135a
R. 8146 ..... 136a

Table of Contents Continued

Page

Testimony Of Dow Jones Witness Wilson
Rebuttal
R. 19558-60 ..... 136a
Testimony Of MPA Witness Cohen
Rebuttal
R. 18495-501 ..... 138a
Testimony Of March Of Dimes Witness Haldi
Direct
R. 11086-90 ..... 143a
Rebuttal
R. 19252-54 ..... 147a
Testimony Of NAGCP Witness Cicchetti
Direct
R. 9365 ..... 150a
R. 9401-24 ..... 150a
R. 9449-61 ..... 167a
Cross
R. 9553-54 ..... 184a
R. 9567-604 ..... 185a
R. 9624-25 ..... 211a
R. 9637-38 ..... 212a
R. 9727 ..... 213a
R. 9745-47 ..... 214a
Testimony Of NAGCP Witness Moshman
Cross
R. 9876 ..... 216a
R. 9878 ..... 217a
R. 9882-83 ..... 217a
R. 9896-97 ..... 218a
R. 9906-11 ..... 220a
R. 9934-39 ..... 224a

Table of Contents Continued

Page

Testimony Of NNA Witness Leggett
Direct
R. 18455-60 ..... 229a
Testimony Of PSA Witness Bunn
Direct
R. 13420-26 ..... 232a
Testimony Of UPS Witness Berliner
Direct
R. 12563-64 ..... 237a
R. 12568-70 ..... 238a
R. 12617 ..... 241a
Testimony Of UPS Witness Smith
Direct
R. 12847-56 ..... 243a
R. 12873 ..... 250a
Cross
R. 12967-68 ..... 251a
R. 13004 ..... 252a
R. 13162-63 ..... 252a
R. 13208 ..... 254a
Memorandum Of The United States Postal Service (5/19/80)
R. 24116-35 ..... 255a
DMMA Motion For An Opportunity To Cross-Examine A Member Of Top USPS Management Concerning The Application Of Pricing Factors (8/13/80)
R. 25715-20 ..... 271a
USPS Response To DMMA Motion For An Opportunity To Cross-Examine A Member Of Top USPS Management (8/25/80)
R. 25841-46 ..... 276a

Table of Authorities Continued

Page

Presiding Officer's Ruling Denying Motion To Call A Member Of USPS Management To Submit To Cross-Examination (9/10/80)

R. 25955-58 ..... 281a

Postal Rate Commission's Opinion And Recommended Decision (2/19/81)

Vol. 1:

pp. 138-141 ..... 284a

pp. 211-217 ..... 288a

p. 222 ..... 294a

Vol. 2:

App. B, pp. 1-33, (¶ 055) 296a

App. G, Schedule 1, p. 1 ..... 324a

App. J.

pp. 225-236 ..... 327a

p. 241 ..... 339a

p. 259 ..... 343a

Testimony Of USPS Witness Alenier (Direct)

[R. 21317] Reasonably assignable costs include (1) those that are fixed with respect to volume, but are incurred to provide a particular level of service to more than one class of mail or service and (2) non-accrued cost items that are part of the revenue requirement, the levels of which can be related to levels of attributable or reasonably assignable accrued costs in the test year. Three types of costs are reasonably assignable in this filing. The first is the fixed portion of Special Delivery Messenger cost (Cost Segment 9). This is assigned to both Express Mail and Special Delivery Service because costs, although fixed, are incurred only due to specific services provided by the Postal Service for these categories. The second is the cost of latent (available but unused) capacity in surface and air transportation modes relating to preferential service. Since the fixed capacity is related to the need to provide preferential transportation to certain categories of postal services, it is reasonably assignable. Mr. Martin discusses the assignment of transportation costs in USPS-T-6. The third is the contingency provision.

Service-related delivery and related costs assigned in Docket No. R77-1 are not assigned in the Postal Service's cost presentation in this proceeding. [R. 21318] Service-related delivery costs represent the fixed costs of maintaining a six-day-a-week delivery network to meet preferential delivery standards for certain classes. The development of these costs, and their evaluation by intervenors and the Commission, is summarized by the U.S. Court of Appeals for the District of Columbia Circuit on pages 406-12 of its opinion in *National Association of Greeting Card Publishers* v. *United States Postal Service* (*NAGCP* III).[1] At page 408, the Court concluded:

---

[1] *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, ___ U.S. ___, 48 U.S.L.W. 3425 (January 8, 1980).

> With this overview, we conclude that the service related cost method reflects a reasonable inference of causation, and despite the imperfections identified by the parties, represents an acceptable first effort at meeting the strictures of NAGCP I. Our conclusion is supported by PRC's avowed intention to require refinement of the service related cost method in future rate proceedings.

The Commission had indicated that:

> The use of service-related costs is admittedly a first effort and, while satisfactory for use in this case, is certainly susceptible of further refinement. In particular, we would expect the Postal Service to (1) refine the analysis in determining the cost differentials resulting from the service priorities at delivery; (2) develop data and a methodology to more accurately reflect the actual hierarchy of delivery standards in the assignment of service-related costs; and (3) investigate more completely the possibility of the extension of service-related costs to other functions besides delivery. [2]

[R. 21319] As indicated previously in my testimony, the cost behavior of city and rural carriers has been the subject of recent extensive analysis. Pending this analysis, the narrower issues of cost differentials resulting from service priorities and the effect of the actual hierarchy of delivery standards on assignment necessarily have been overtaken. Since development of service-related costing beyond the "first effort" has not been attained, assignment of service-related costs in this proceeding would not reflect improvements alluded to by the Court and the Commission, and would be premature. For informational purposes, however, service-related costs for the test year at proposed rates are provided in witness Dalton's exhibit USPS-8H.

Costs which are not classified as attributable or assignable, as interpreted by the courts, are considered institutional. These are costs for which no volume or service link can be determined.

---

[2] Docket No. R77-1, PRC Opinion, Vol. 1 at 123, 124.

B. Segment And Component Modifications

Base year 1979 costs reflect changes of two types from those presented in the base year in Docket No. R77-1. Analytical changes result from new and modified analyses of cost elements and may include resultant changes in cost development [R. 21320] procedures. Methodological changes stem from modifications to data sources, forms, and cost development procedures.

Analytical changes are reflected in the following segments: (1) Postmasters, (2) Supervisors and Technical Personnel, (3) City Delivery Carriers-Street Activity, (4) Special Delivery Messengers, (5) Rural Carriers, and (6) Transportation. Methodological changes have occurred in the following segments: (1) Clerks and Mailhandlers, CAG A-J Offices, (2) Clerks, CAG-K Offices and (3) Vehicle Service Drivers. Less significant changes in other segments resulting from modifications to the segments enumerated above are also discussed in my testimony.

Postmaster salaries are now determined by the Expanded Postmaster Criteria System (EPCS). A new model relates volumes to costs via the operation of EPCS. It is presented as my exhibit USPS-7A.

In Docket No. R77-1, an analysis presented as exhibit USPS-4 included the cost of "Other Supervisors and Technicians." In light of (1) the removal of postmaster costs from consideration by this model and (2) the determination that the cost [R. 21321] of techinical personnel is not variable with volume, the referenced analysis has been revised. The modified analysis is presented as exhibit USPS-7B.

In Docket No. R77-1, development of the cost of Administrative Clerks depended partly on the use of payroll and job description information. In FY 1979, corresponding costs have been determined directly by use of the In-Office Cost System.

Cost Segment 7, City Delivery Carriers-Street Activity, incorporates initial results of an ongoing analytical effort for

which I have had a principal responsibility. I present details relating to the design, data collection implementation, analyses, and results in exhibit USPS-7C. Current data provide bases for costing modifications which relate to: (1) amounts of cost by activity type, (2) variabilities, and (3) cost distributions to rate categories. These modifications also affect costs in other segments. Such interdependencies are noted in the presentation for each affected cost segment.

The Vehicle Service Driver analysis presented as exhibit USPS-7 in Docket No. R77-1 has been updated. Although there have been no alterations in the analytical approach, considerable [R. 21322] additions to the available data base have enabled the Postal Service to calculate a variability more reflective of the characteristics of the operation.

Special Delivery Messengers now deliver both Express Mail and Special Delivery pieces. As a consequence, fixed costs in this segment are assigned to these two categories. This assignment recognizes that fixed costs here result from the provision of a service particular to these categories.

Base year 1979 costs include the result of a contractor analysis of Rural Carrier costs. It is based on the evaluation system used to determine pay and on empirical data collected from a sample of nearly 600 routes. The contractor report is presented as my exhibit USPS-7D, since I was a principal liaison on the contract.

Witness Martin presents the results of an analysis of the transportation segment. Costs are classified as attributable, reasonably assignable or institutional, as interpreted by the courts, according to the study conclusions and are integrated into the base year presentation. Some modified distributions also result from Mr. Martin's examination.

[R. 21323] II. SEGMENTS AND COMPONENTS REVIEWED

A. Postmasters—Cost Segment 1

In Docket No. R77-1, the Postal Service applied the results of two analyses to determine postmaster cost variability: one was applied to postmaster cost at CAG-L offices; a second determined the variability of CAG A-K postmaster costs. In each case, the analytical method was directly related to the Postal Service approach to compensation.

At that time, CAG-L postmaster salaries were based on a system which awarded points for each of six factors. The resultant point total for each postmaster determined the hours of service of each office and the postmaster's grade level. CAG A-K postmaster grades were determined according to standard structures established for post offices of varying sizes. For detailed descriptions of the analytical methodologies employed for CAG-L and CAG A-K postmaster costs, see in Docket No. R77-1, exhibit USPS-15, pages 11-20 and exhibit USPS-4, respectively.

Since the conclusion of the Docket No. R77-1 proceeding, the Postal Service has instituted a different method to determine most postmaster salaries. [R. 21324] Entitled the Expanded Postmaster Criteria System (EPCS), it is designed to determine postmaster salaries by application of one set of criteria, consisting of eight workload factors. These factors are (1) general deliveries, (2) lockbox/caller service, (3) possible city deliveries, (4) rural boxes served by carriers for whom the postmaster is administratively responsible, (5) rural boxes served by carriers from other offices but who sequence and deliver incoming mail sorted at the postmaster's facility—sometimes referred to as intermediate responsibility, (6) rural boxes on highway contract (star) routes for which the postmaster has administrative responsibility, (7) rural boxes on highway contract routes for which the postmaster has only intermediate responsibility, and (8) revenue units.

Of the eight, only the revenue units factor represents a specific measure of volume and thus lends itself to the computation of variability. However, revenue units cannot be used directly to develop variabilities because the EPCS assigns differing weights to revenue units according to the quantity generated in each office. The weight diminishes as office revenue units increase.

[R. 21325] Variability estimates are developed by using the revenue unit weighting process to determine indicated activity levels. Empirical data general from the application of the EPCS in 29,797 offices were used to develop percentage values. These data represent almost all associate offices with postmasters at grade levels EAS-22 and below.

The amount of volume required to move from one grade level to the next (both up and down) was determined for each grade. The cost levels, before and after, were computed. Percent changes in cost divided by percent volume changes represented variabilities. These were weighted according to the distribution of postmaster cost by grade to determine an overall variability. Table 1 presents results for FY 1979. See exhibit USPS-7A for study details.

[R. 21326]

Table 1

POSTMASTERS
ANALYTICAL RESULTS, FY 1979

Component	Cost ($000)		
	Total Accrued	Attributable	Variability
Postmasters, at AOs EAS-22 and below	$599.425	$115,329	19.2%
Postmasters, at AOs EAS-24 and above and at SCFs	16,001	—	—
BMC General Managers	818	—	—
Total	$616,244	$115,329	18.7%

Postmasters and managers in SCFs and grades above EAS-22 are not paid according to these criteria. The model, therefore, was not appropriate for these employees. Since the salaries of these positions and the numbers are determined by management according to factors which do not in any direct way take into account mail volume levels, these costs are classified as institutional.

[R. 21327] B. Supervisors And Technical Personnel—Cost Segment 2

Higher-level supervision costs were considered to be partly variable in Docket No. R77-1. This conclusion resulted from the application of the results of a study of management structure cost. The Postal Service did (and still does) establish higher-level supervisory positions according to standardized structures for offices of varying sizes. For a detailed description of the application of this approach, see exhibit USPS-4 in Docket No. R77-1.

In Fiscal Year 1979, the analytical approach remains the same, but certain adjustments have been made to improve the earlier model. The Commission and I recognized, in Docket No. R77-1, that "some of the managerial costs at larger offices are associated with smaller offices."[3] As a result, the Commission proposed "that the Service should consider deriving more precise variability factors [R. 21328] in future cases through a more detailed analysis.[4] The results of just such an analysis have been incorporated in FY 1979 costs.

The Docket No. R77-1 analysis of Cost Segment 2 Management Structure Costs included expenses for (1) higher-level supervision and (2) technical personnel. The Postal Service has reviewed all of the employee positions included in the Cost

---

[3] Docket No. R77-1, PRC Opinion, Vol. 2, App. J at 12.

[4] Docket No. R77-1, Opinion, Vol. 2, App. J at 13.

Segment 2 analysis. This review indicates that some of the positions are for personnel responsible for coverage of a geographic area while others are for supervisors responsible for the activities of given numbers of employees. The costs of those whose numbers vary partly with the numbers of employees in the offices have been included with the revised analysis; the costs of those whose numbers are based on geographic and management design considerations have, because of their nature, been classified as institutional. For a detailed description of this revised study, see exhibit USPS-7B.

[R. 21329] C. Clerks And Mailhandlers, CAG A-J Offices—Cost Segment 3

The treatment of costs included in this segment departs in two ways from that presented in Docket No. R77-1. A discussion of one methodological change, for Administrative Clerks, follows:

In Docket No. R77-1, the cost of each of the seven categories of Administrative Clerks was developed by application of job description and payroll information. See exhibit USPS-6 for a detailed description of the methodology employed. Essentially, ratios were developed by costing out each category according to the payroll costs associated with the relevant positions. The resultant ratios were then multiplied by the total In-Office Cost System (IOCS) cost for Administrative Clerks to develop seven separate cost pools.

The FY 1979 Revenue and Cost Analysis (RCA) Report reflects a modest improvement in the procedure. The IOCS was modified so as to separately identify the cost for each of the seven categories. The costs are now thus determined directly by work sampling without the need for payroll or job description information. For a description of the procedure, see Library Reference C-3.

[R. 21330] Dr. Merewitz makes a further modification of a portion of mail processing costs in this segment. He determines a dollar amount which is associated with peaking pat-

terns and the percentage distribution of these costs according to responsibility by rate category.[5] This adjustment has an indirect impact in such areas as supervision and service-wide costs, although it is not discussed in other segment descriptions. For descriptions of the interrelationships among segments, see Library Reference C-3.

D. Clerks, CAG-K Offices—Cost Segment 4

In Docket No. R77-1, the cost of clerks in CAG-K offices was developed through the use of data obtained from Forms 45, 48 and 102. The procedure is described in Docket No. R77-1, exhibit USPS-15, pages 57-58.

The FY 1979 RCA Report reflects an improved cost development procedure. The IOCS has been expanded to include clerks at CAG-K offices. Thus, these costs, by rate category, are now determined by the use of work sampling according to the general procedures developed for clerks in CAG [R. 21331] A-J offices. A description of this new procedure can be found in Library Reference C-3.

E. City Delivery Carriers, Office Activity—Cost Segment 6

In Docket No. R77-1, this segment included the cost of vehicle loading. Carrier procedure had included "clocking out" to the street after the vehicle was loaded. See Docket No. R77-1, exhibit USPS-15, page 67. Subsequent to that docket, an operational change was instituted so that carriers are now instructed to "clock out" as they exit the facility with mail to be loaded into vehicles. The cost of vehicle loading, therefore, is now included in Cost Segment 7.

F. City Delivery Carriers, Street Activity—Cost Segment 7

In the base year, the Postal Service has incorporated results from several nationwide studies: (1) the Carrier Cost Survey

---

[5] Adjustment of base-year Segment 3 mail processing costs for peak load redistribution is shown in my workpapers.

(CCS) of residential and mixed routes, (2) the Curbline Access Test (CAT), and (3) the Household Mailstream Study (HMS). Results from these three studies provide opportunities for improvements in the costing of city delivery carrier street time. For a full discussion of the application of these studies, see exhibit USPS-7C.

[R. 21332] The Delivery Services Department utilized services of the Office of Industrial Engineering to study City Delivery Carrier routes for the purpose of establishing performance standards for office activities. The Rates and Classification Department was able to avail itself of these same resources for a comprehensive study of carrier street activities.

Training programs were extensive. Industrial engineers conducted a two-week feasibility test at Shawnee Mission, Kansas in the fall of 1978. As an observer at that session, I determined effective ways to design a system to meet Rates and Classification Department needs. A four-week pilot test was conducted at Oklahoma City, Oklahoma in the spring of 1979. During that test, I presented our perspectives of costing and carrier behavior in a manner so as to enable industrial engineers (IEs), during data collection, to make informed judgments when the need arose. Data collection coordinators participated in this test, and, upon its conclusion, returned to their home regions to train groups of data collectors. Members of the Rates and Classification staff monitored these regional training sessions. The Southern Region session, which I attended, demonstrated to me the high quality of the training.

[R. 21333] The basic approach to collecting the information was a shared responsibility between members of two-person teams. Each team consisted of an IE and a data collection technician/officer (DCT). The industrial engineer recorded separate times for several dozen activities as they were observed. The DCT, with the carrier, determined test stops for detailed street observations and also counted both delivered and collected mail by shape and rate category. The DCT also drove a car to follow the carrier on motorized routes.

The IE collected time information on a device called a "Datamyte." Like a sophisticated chess clock, this device recorded elapsed times by code as the function represented by each code was observed. Since an internal clock was always in operation, all observed time was accounted for. This device, when plugged into a terminal, then transmitted the record to a computer file.

Each DCT collected information on route and mail characteristics and recorded it on four forms: RC-1, RC-2, RC-3 and RC-4. Form RC-1 was used to record mail volumes for the observed route, principally by shape. Physical characteristics associated with stops selected for more detailed study (test stops) were recorded on the [R. 21334] Form RC-2. Mail volumes by rate category and shape (delivered and collected) were recorded for each test stop on Form RC-3. Travel time, obtained from Form 3999, was transcribed onto Form RC-4.[6] Information from all forms was keypunched onto magnetic tape and stored in files compatible with the Datamyte files.

The sample design was formulated in the following manner. Questionnaires were sent to approximately 17,000 randomly selected carriers. Based on the information collected and a pilot test, a sample of 886 residential and mixed carrier routes was selected for study according to statistical sampling techniques. The required sample size was subsequently reduced to 880. All 880 routes were studied.

Based on observations of studies as well as the functional time information collected by Datamytes, the time recordings were used to apportion street time costs for each of six route types[7] into functions.[8] The results are reproduced in Table 2 on the following page.

---

[6] The Form RC-4 was actually completed by Headquarters personnel, using Forms 3999 obtained at carrier stations by the IEs/DCTs.

[7] Residential foot, curbline, park and loop; and mixed foot, curbline, park and loop.

[8] The Curbline Access Test results were used to adjust Datamyte information for route and access times on curbline routes.

[R. 21335]

Table 2

PROPORTIONS OF TIME FOR STREET ACTIVITIES

	Route Type					
	Residential			Mixed		
Activity	Foot	Curbline	Park&Loop	Foot	Curbline	Park&Loop
Route	33.8%	24.0%[1]	40.2%	36.8%	26.6%[1]	41.7%
Access	25.0	25.0[1]	24.0	20.3	26.7[1]	19.3
Load Parcels/ Accountables	1.8	2.1	1.7	2.5	3.3	2.3
Other Load	15.0	15.8	9.4	14.4	17.3	9.8
Travel	10.7	11.1	9.8	11.9	8.4	9.2
Other Carrier/ Variable	3.9	5.0	4.2	3.0	0.9	4.6
Other	9.8	17.0	10.7	11.1	16.8	13.1
Total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%

[1]These values reflect Curbline Access Test adjustments. See exhibit USPS-7C.

[R. 21336] Categories of activities are similar to those presented in the past, with several notable exceptions. "Load parcels/accountables" covers all time associated with the delivery of the referenced items; "other load" includes the remainder of load time. "Other carrier-variable" includes vehicle inspection and service to vehicles on the street (principally obtaining gasoline). "Other" includes mail preparation at delivery receptacles, vehicle load, collection and relay. For purposes of analysis and presentation, five separate functions were developed: (1) route, (2) access, (3) parcel/accountable load, (4) other load, and (5) other.

The Curbline Access Test was used to introduce adjustments for the access/route time "split factor" on curbline routes, since it is not possible to separate access (slowing down and starting up) from route time (traveling the route path

without changes of speed due to stops) by direct measurement. This test, conducted by Foster Associates, Inc., determined the "split factor" by making eight series of measurements of each sampled route. Two measurements were of the time to traverse the active portions of each route without stopping; the other six timed situations where designated fractions of total possible stops were made. By use of regression [R. 21337] analysis a curbline split factor was developed. The resultant route/access split factor was then applied to the combined route plus access time as measured by the CCS on curbline routes.

The next step was analyses of load time. The relationship between time and mail volume was examined in a two-step process. The first step tested the relationship between pieces delivered and time at individual stops; the second examined the effect of mail volume on coverage. Understanding of carrier behavior based on study observations was of paramount importance during this as well as other analytical phases.

Volume/time relationships were determined through regression analyses on information from about 8,300 test stops. There were two principal findings: (1) parcels and accountables tend to be delivered singly to addresses on residential and mixed routes, and (2) other mail tends to be delivered tin batches which take approximately the same amount of time of delivery regardless of the number of pieces. Parcel and accountable load costs are thus considered 100 percent variable with volume, while other load [R. 21338] costs are variable only to the extent that mail volume changes cause additional batches to be delivered. [9]

---

[9] A corollary finding is that only one batch is normally delivered to an address. If a large volume of non-parcel/accountable mail is to be delivered, it will be tied in a bundle at the office.

Next, the Household Mailstream Survey report was examined for information relating to the relationship between mail volume and coverage. This survey included measures of pieces-per-delivery and coverage over the course of a year. Several regressions were run using pieces-per-delivery as the independent variable and coverage as the dependent variable. The regression selection yields a coverage/volume variability of 42.7 percent. This value happens to be the highest of several findings and is based on a curve which conforms with operational realities. For more detail, see exhibit USPS-7C.

The variability ascribed to "other load" costs on residential routes is thus 42.7 percent. Prior and current costing of business routes treat business coverage as fixed with respect to volume. Variability on mixed (business and residential) routes was thus one-half of 42.7 percent, or 21.35 percent.

[R. 21339] Owing to the effect of stops which contain multiple deliveries, however, load coverage variability is necessarily different from that for access coverage. If one delivery at a stop with several does not receive mail, load coverage will be less than 100 percent; access coverage, however, is unaffected.

Next, the relationship between stop coverage and mail volume was examined. The Household Mailstream Survey results applied to "other load" costs proved useful for that purpose. Since the survey considered only possible deliveries, however, an adjustment had to be made to achieve a stop basis compatibility. This adjustment was based on information on the numbers of possible deliveries at stops collected for the 8,300 stops referenced above. The resulting variability of access costs for residential routes was 39.0 percent; for mixed routes, 19.5 percent. For a detailed description of the procedure, see exhibit USPS-7C.

Finally, information from Forms RC-3 provided attributable cost distributions keys. Other load costs were distributed, by route type, according to the distribution of pieces other than parcels and accountables. This procedure is described more fully in exhibit USPS-7C.

[R. 21340] Studies of carriers are continuing. Business route, time series and support route surveys are being conducted in a similar (but not identical) manner to that for residential and mixed routes. It is expected that these studies will lead to the creation of a revised system for reporting attributable costs by rate category, although dates and methods of implementation of such a system are dependent upon the results of the predecessor work.

G. Vehicle Service Drivers—Cost Segment 8

In Docket No. R77-1, the Postal Service incorporated the results of a study of Vehicle Service Driver operations. Described in exhibit USPS-7 in that docket, a conclusion was reached that about 7 percent of the segment accrued cost was variable. The variability result was based on an analysis of data from Washington, D.C. assessing the influence of mail volumes on differential "stop times."

In this docket, I present the results of expansion of the original analysis. Data from nine cities are now included. The analytical method, however, remains the same. The result of this update is an increase in the level of variable costs to an estimated 16 percent of total VSD costs.

[R. 21341] Further revisions of the analysis are projected. The Carrier Cost Survey has been extended to include City Carrier routes for which there is a functional correspondence with Vehicle Service Driver runs. As indicated in Library Reference C-3, a functional rather than route type categorization is most appropriate for analytical purposes. It may be feasible, therefore, to combine similar functions across employee craft lines to facilitate an understanding of the relationships between costs and mail volumes. This approach will be examined more fully as carrier data become available.

H. Special Delivery Messengers—Cost Segment 9

In Docket No. R77-1, all Special Delivery Messenger expenses were attributed to the Special Delivery rate category. Some of the attributed costs were classified as short-run variable; others were specific fixed. Cost treatment modifications since the conclusion of that docket, however, reflect changes in the operations of these employees.

The impact of Express Mail service on the operations of Special Delivery Messengers is reflected in the treatment of Cost Segment 9 costs. Special Delivery Messengers now deliver [R. 21342] both Express Mail and Special Delivery. Thus, fixed costs are no longer specific fixed. Now, they result from the provision of services particular to the aforementioned two categories.

An analysis utilizing data developed in the Express Mail Cost Study (see Docket No. MC79-2, Library Reference USPS-LR-3) was used to determine the variable and fixed portions of office and street time costs. Fixed costs are classified as reasonably assignable. Unit processing costs for Express Mail Service options developed in the 1977 Express Mail Cost Study are applied to FY 1979 Express Mail Service volumes handled by Special Delivery Messengers to determine the portion of costs associated with Express Mail. The remaining costs are attributed/assigned to Special Delivery Service.

I. Rural Carriers—Cost Segment 10

A major improvement in the costing of rural carriers is reflected in the base year. Prior to this improvement, the costing of rural carriers was principally via analogy with motorized residential city delivery carriers, with some adjustments to reflect differing operational circumstances. For heavy duty routes, costs were divided [R. 21343] into functions according to the division of costs for motorized residential city delivery carriers. Variabilities were also the same, except for that of travel time costs. Regular rural route costs were treated in the same manner as those of heavy duty routes, except that access

time was considered institutional. Equipment maintenance allowance costs were treated as institutional. For a description of the application of this approach, see Docket No. R77-1, exhibit USPS-15, pages 95-104.

A new study, recently completed, examines the relationship between rural carrier payroll costs and mail volumes. See exhibit USPS-7D. This relationship was analyzed separately for each type of route. [10] Consideration was also made of reclassification of routes and of provisions for carrier assistance. The study relies on data from the Rural Carrier Study conducted as part of the Docket No. MC76-5 proceeding. The sample was supplemented to bring the total to approximately 600.

[R. 21344] Workload information for the sample was obtained from the September 1978 Annual Count. This information includes workload data used to develop evaulated times by activity as well as total evaluated times.

Certain measures of workload are by their character volume-variable; others are not. Mail handling is an example of the former; route mileage is included in the latter.

Total payroll costs, assuming all routes were compensated according to evaluated times, were determined for sampled routes. Costs were then broken down according to variability characteristics. See exhibit USPS-7D, Appendix 5 for a separation of functions between those fixed and those variable. Volume-related elements comprised about 32.2 percent of evaluated times for all routes in September 1978; fixed elements constituted the remainder. These aggregate values do not, however, take into account (1) relationships between costs and volumes for those route types not compensated according to evaluated times, (2) shifts between route types which could result from volume changes, and (3) the use of auxiliary assistance.

---

[10] The various route types identified and defined in exhibit USPS-7D are H, J, K, M, S and A; regulars and substitutes.

[R. 21345] A 10 percent increase was then applied to the volume-variable portions. The resultant percentage changes in total costs were then divided by the 10 percent volume changes to develop variabilities for those routes whose classification remained unchanged after the volume increase.

For those routes whose classification would (or might) change, normal procedures for adjustment were developed. Consideration of overtime pay, the use of substitutes and route reclassification were factors considered in calculating after-volume-change costs levels. See exhibit USPS-7D for a description of the methodology employed.

Finally, a sensitivity analysis was performed. Cost changes resulting from both 3 and 5 percent volume changes were calculated to determine if the calculated correspondence between volumes and costs could be generalized. Since the resultant variabilities are substantially the same as for a 10 percent change, the variability conclusions which result in the values displayed in Table 3 are generally applicable.

This study is empirically based in that data from actual rural routes form the analytical basis and the costs that would actually be incurred by the Postal Service are computed based on percentage volume increases.

[R. 21347] J. Custodial And Maintenance Services—Cost Segment 11

The analytical method used to develop base year costs for this segment is the same as that applied in Docket No. R77-1. Changes in other cost segments, however, indirectly affect some costs here. For an explanation of this phenomenon, see Library Reference C-3, Cost Segment 11.

K. Motor Vehicle Service—Cost Segment 12

The information collected from the Carrier Cost Survey, Curbline Access Test and Household Mailstream Study affect the levels of attributed cost associated with carrier use of

[R. 21346]

Table 3

RURAL CARRIER COSTS[1]

Route Type	Cost ($000) Total Accrued	Variable	Variability
1. Heavy Duty	$517,539	$182,392	35%
2. Other	203,069	14,831	7
3. Totals	$720,608	$197,223	27%

[1] Based on salary schedules effective May 20, 1978.

motor vehicles. Differing amounts of time associated with vehicle usage imply differing amounts of cost in this segment related to that usage. Further, different proportions of variable cost in Cost Segment 7 cause changes in the proportion of motor vehicle service cost attributed as a consequence.[11]

[R. 21348] **L. Miscellaneous Operating Costs—Cost Segment 13**

As in the Motor Vehicle Service segment, the carrier information which affects base year carrier street costs also affects amounts of attributed cost for carfare and driveout agreements with carriers. The effect is due to the linkage between carrier workload (for carriers who do not use Postal Service vehicles) and amounts expended by the Service for carfare and driveout agreements.

[11] For an explanation of the phenomenon, see in Docket No. R77-1, USPS-T-73, pages 30-33 and exhibit USPS-15, page 117.

M. Transportation—Cost Segment 14

Mr. Martin presents the results of new significant analyses in USPS-T-6. Three kinds of changes are reflected. First, some distributions have been modified to relate cost categories more closely to volumes which generate the costs. Second, other modifications are due to Postal Service operational changes. Third, some costs have been reclassified. Domestic transportation costs are now attributable, reasonably assignable or institutional, as interpreted by the courts. The distribution key changes are applied to FY 1979 and described in Library Reference C-3; cost classification adjustments are made in the base year and are supported by USPS-T-6.

[R. 21349] N. Building Occupancy Costs—Cost Segment 15

The proportions of cost attributed here are affected by two types of changes: (1) analytical and (2) data.

Portions of the cost in this segment are influenced by changes in other segments. Since variabilities associated with City Delivery and Rural Carriers have changed, the associated variabilities of the cost of floor space covered in this segment also change. These changes reflect only the result of the linkages between Cost Segments 7 and 10 on the one hand and Cost Segment 15 on the other.

More current data have influenced the attributed costs of Cost Segment 15. The cost of the component "Rents" is based on estimates of current rental values and functional distributions of available space in Postal facilities. These values have been reestimated using more current information than that developed for Docket No. R77-1. See Library Reference C-3.

O. Supplies and Services—Cost Segment 16

Component 16.3, entitled "Other Supplies and Services," contains costs linked to those of other segments. Specifically, amounts of cost attributed for custodial and maintenance supplies [R. 21350] are linked to attributions for floor space. Since

levels of attributed floor space costs are affected by the new carrier analyses, the identified costs in this segment are affected as well, though indirectly.

P. Research, Development And Engineering—Cost Segment 17

This segment covers costs relating to contract research, development and engineering activities. As in Docket No. R77-1, this cost is classified as institutional, since the level is unaffected by mail volume.

Q. Administration And Regional Operations—Cost Segment 18

This segment includes three components; each component includes several subcomponents. Analytical changes since Docket No. R77-1 are reflected in three subcomponents of one component; namely (1) Headquarters Administration—All Other, (2) Regional Administration, and (3) Security—All Other.

In Docket No. R77-1, the Postal Service assumed that the costs in these three subcomponents were variable with volume to the same extent as management structure costs. See exhibit USPS-15, pages 185-86. That paragraph indicates that the assumption was "for present purposes." Upon review, the Postal Service has decided to classify these costs as institutional.

[R. 21351] The Postal Service has examined the activities for which these costs are incurred. We find no link between numbers of people employed in these functions and volumes of mail; further, we find no link between salaries and mail volumes. Thus, no cost-volume relationship is demonstrated. The levels of costs are influenced by legal requirements, reporting needs, other management design considerations, and demography. Therefore, they are classified as institutional.

R. General Management Systems—Cost Segment 19

The level of costs in this segment results from management design and other non-volume factors. These costs thus continue to be classified as institutional.

S. Other Accrued Expenses—Cost Segment 20

Many of the expenses in this segment are linked to those of other segments. Certain labor benefits are related to salaries, and depreciation expenses are tied to maintenance expenses. Because the Postal Service develops its analyses in this manner, changes in other segments are often reflected in this segment as well. Such changes discussed previously as those in city and rural carrier attributable costs are reflected by modifications to portions of this segment as well.

[R. 21352] III. UNIT COSTS FOR INTRA- AND INTER-BMC PROCESSING

This section describes the development of mail processing unit costs for intra- and inter-BMC (1) parcel post and (2) special rate fourth-class. For completeness, I also briefly describe the steps which lead to these unit costs that are sponsored by other witnesses. Witness Miller provides details relating to general Postal Service operational considerations; a model,[12] developed by Universal Analytics, Inc., develops mail flows and resultant processing times.

An intra-BMC parcel is one which originates and destinates in the same BMC service area; and inter-BMC parcel does not. By definition, an intra-BMC parcel can receive handling at only one BMC; according to witness Miller, an inter-BMC parcel is handled at either two or three BMCs, the latter if transshipment is necessary.

The Universal Analytics model provides a vehicle for quantifying handling differences between intra- and inter-

---

[12] For a summary description of the model, see the direct testimony of Dr. Merewitz, USPS-T-9.

BMC mail pieces for various categories. These results are translated to unit costs in Library Reference C-4. [13] [R. 21353] I have adjusted these costs to test-year levels and have added to those levels a proportionate amount for supervision and service-wide costs. Exhibit USPS-7H details my methodology and presents the results of this procedure in tabular form. Column (1) lists unit costs provided in Library Reference C-4; column (2) displays these costs restated on a test year basis; and column (3) includes indirect costs added to column (2).

[R. 21354] IV. CONCLUSIONS

I conclude that base-year 1979 costs as presented in exhibit USPS-7F present a fair and accurate picture of attributable and assignable costs. Further, the analytical changes since Docket No. R77-1 incorporated therein represent significant improvements in costing, both with respect to analytical treatment and development.

---

[13] This document was prepared by Universal Analytics, Inc., and the Mail Classification Research Division.

[R. 21518]

SUMMARY OF INCOME AND COSTS FOR MAJOR SERVICE CATEGORIES
Fiscal Year 1979
(In millions)

	Revenues[1]	Attributable/ Assignable Costs	Revenue Contribution to Institutional Cost	Revenue as a Percent of Attributable/ Assignable Costs
First-Class Mail	$ 9,732.7	$ 7,550.0	$ 2,182.7	128.9%
Priority Mail	560.7	284.2	276.5	197.3
Express Mail	133.6	49.6	84.0	269.4
Mailgrams	14.6	3.3	11.3	442.4
Second-class mail:				
Within the county	20.9	81.9	(61.0)	25.5
Outside the county:				
Nonprofit publications	63.9	174.2	(110.3)	36.7
Classroom publications	3.0	6.0	(3.0)	50.0
Regular-rate publications	535.2	561.6	(26.4)	95.3
Fees	13.9	—	13.9	—
Total publishers' mail	636.9[2]	823.7	(186.8)	77.3
Transient mail	6.8	11.0	(4.2)	61.8
Total second-class mail	643.7	834.7	(191.0)	77.1
Controlled circulation publications	94.9	71.6	23.3	132.5

[THIS PAGE INTENTIONALLY LEFT BLANK]

	Revenues[1]	Attributable/ Assignable Costs	Revenue Contribution to Institutional Cost	Revenue as a Percent of Attributable/ Assignable Costs
Third-class mail:				
Single piece rate	221.4	318.4	(97.0)	65.5
Bulk rate - regular	1,545.6	1,330.9	214.7	116.1
Bulk rate - presort	208.7	69.1	139.6	302.0
Bulk rate - nonprofit	212.9	438.0	(225.1)	48.6
Fees	27.7	—	27.7	—
Total third-class mail	2,216.3	2,156.4	59.9	102.8
Fourth-class mail:				
Parcels (zone rate)	431.5[3]	381.1	50.4	113.2
Bound printed matter	54.8	44.7	10.1	122.6
Total zone-rate mail	486.3	425.8	60.5	114.2
Special fourth-class rate	239.1	233.4	5.7	102.4
Library rate	22.0	60.8	(38.8)	36.2
Total fourth-class mail	747.4	720.0	27.4	103.8
Government mail	663.1	343.6	319.7	193.0
Free mail for the blind and handicapped	—	9.5	(9.5)	—
International mail	549.7	431.7[4]	118.0	127.3
Total mail	15,356.9	12,454.6	2,902.3	123.3
Special services	708.5	618.5	90.0	114.6

[R. 21518]

SUMMARY OF INCOME AND COSTS FOR MAJOR SERVICE CATEGORIES—*Continued*
Fiscal Year 1979
(In millions)

	Revenues[1]	Attributable/ Assignable Costs	Revenue Contribution to Institutional Cost	Revenue as a Percent of Attributable/ Assignable Costs
Miscellaneous items.....	58.6[5]	—	58.6	—
Total mail and services	16,124.0	13,073.	3,050.9	123.3
Appropriations: Revenue forgone.	799.5	—	799.5	—
Public service ...	920.0	—	920.0	—
Total operating income	17,843.5	—	—	—
Investment income.....	330.8	—	330.8	—
Total	$18,174.3	13,073.1	$5,101.2	139.0%
Institutional costs.....		4,631.4		
Total operating expense		$17,704.5		

Testimony Of USPS Witness Alenier (Cross)

[R. 5739] On p. 12 of the summary tables of the 1979 Revenue Cost Analysis (RCA), Exhibit USPS-7E, the unit attributable cost of third class bulk "ordinary" matter is listed as 9.1 cents while that of "books, catalogues" is 4.1 cents; and the unit weight of the ordinary matter is 1.5 oz. in comparison to the 4.1 oz. for books, etc.

a. Please explain why the unit cost of ordinary matter can reasonably be expected to be more than double that of books, etc., even though the average piece of ordinary matter weighs only about 1/3 as much.

b. If you are unable to provide the explanation requested in (a), above, please provide the correct unit attributable costs and explain the source of the error.

Witness Allen does not use the unit cost distinction to which you refer in setting rates for "ordinary" and "books and catalogs." The unit cost separation between ordinary matter and books is subject to some uncertainty. "Ordinary" rate and "books, catalogs" rate third class often are difficult to distinguish when taking in-office cost tallies. [1] Therefore, we do not have the same degree of confidence in the unit costs for these sub-categories that we do for regular rate and nonprofit rate bulk third class, the cost separation used by witness Allen [R. 5740] to develop rates. Since the rate differentials between "ordinary" and "books, catalogs" are not based on the reported unit cost differentials for these categories, any error to which these are subject does not affect rate development.

* * * *

[R. 6358] was intended to focus on all aspects of levels of attribution and assignment.

---

[1] As an example, third class matter is frequently sealed in envelopes. Postal data collection technicians would have to open these envelopes and count the pages to determine, with certainty, if the contents were eligible for the "ordinary" rate or the "books, catalogs" rate.

The issue of the level of reasonably assignable costs for city delivery carriers is a subpart of the overall analysis.

What I intended by that statement was that the reasonable assignment of city delivery carrier costs was overtaken by the overall study of city delivery carrier costs, and since I first focused on levels of attributable costs there was inadequate time and resources available to develop reasonably assignable city delivery carrier costs.

Q. As the primary witness for interpreting cost policy in this proceeding, were service-related costs omitted from base year costs—that is USPS-7-F. In response to your conclusions and recommendations?

A. No.

Q. Therefore, who made the decision to omit service-related costs from base year costs?

A. I don't know precisely who made the decision.

Q. Was it Postal Service management?

A. I would presume it was Postal Service management. It was communicated to me through the Law Department and through the general manager of the Revenue and Cost Analysis Division.

Q. Who is that?

A. Frank Heselton.

Q. Did you conclude that the R77-1 three day-six day [R. 6359] delivery criterion for assigning service-related costs was invalid?

A. It is my conclusion that it is an inappropriate method for determining service-related costs.

Q. On what basis did you reach that conclusion?

A. Over the past couple of years I have been doing extensive studies of city delivery carriers and one thing that I became very much aware of was that the fact that mail is

deferrable is not the same thing as the fact of its actual deferral. And it is my belief that cost attribution and/or assignment based on Section 3622(b)3 of the Postal Reorganization Act ought to be based on cost causality. My conclusion is that the difference between three day and six day delivery is a hypothetical one, and the actual difference in costs which result from the actual act of deferring mail is a very small subpart of the cost estimates which are provided in this proceeding as service-related costs.

Q. Did anyone else responsible for interpreting cost policy reach that same conclusion, to your knowledge?

A. I understand that my conclusion is generally consistent with that of the Law Department and of Postal Service management in the Revenue and Cost Analysis Division, and with other cost analysts within that division. It is difficult for me to respond to that question in terms of those responsible for interpreting cost policy.

[R. 6360] Q. Could you identify some of the people not in the Legal Department but in Postal Service management that have reached the same conclusion as you?

A. I am aware, as I said, that the general manager of the Revenue and Cost Analysis Division has reached that conclusion.

Q. And do you know of anyone else?

A. I have had some conversations with Mr. Martin about this, and my understanding is that he generally agrees with my conclusion in this regard.

Q. And anyone else?

A. I am not aware of anyone else in the cost area.

Q. I would like to ask you some questions with respect to your revised answer to DMMA Interrogatory 1-F, filed on Friday, August 1.

First of all I would like to ask you what made you decide to revise your original answer that there were not any reasons for the Service's decision to abandon service-related costs other than those stated in your testimony?

A. I had a meeting on Friday the 25th of July with members of the Law Department and with the general manager of the Revenue-Cost Analysis Division in preparation for my appearance here, at which potential cross-examination questions were posed to me. During a discussion that ensued with respect to service-related costs this information was communicated to [R. 6361] me by those people

Q. And the conclusion reached at that meeting that your original answer to DMMA Interrogatory 1-F was inaccurate?

A. Well, it was based on less than comprehensive information. My information at the time made it an accurate response. I was provided with additional information at that meeting which required that I amend the response.

Q. Was it your decision alone then to revise your answer to DMMA Interrogatory 1-F?

A. It was necessary for me to revise it, Mr. Mackiewicz, because I had obtained additional information that made my earlier response not an accurate one.

Q. My question was whether it was your decision alone as a result of that meeting to revise your answer, or was it a decision reached by all the people present at that meeting?

A. No, it was not a decision that was reached by all those present at that meeting. It is quite unlikely that all present at that meeting were familiar with my specific responses to all of my interrogatories.

It was my decision in consultation with my attorney.

Q. I would like to ask you what did you exactly mean by the final sentence in your revised answer to DMMA Interrogatory 1-F, "The principal policy consideration is that service-related costs are hypothetical, not actual?"

A. I discussed that earlier. The difference in cost [R. 6362] levels which result from the application of the hypothetical three day-six day delivery situation is different from the difference in cost levels which would result by the absence of any deferral of mail at delivery units.

In other words, mail which is deferrable is of a much greater quantity than mail which is actually deferred, and the assumptions implicit in the development of service-related costs are based on the proposition that deferrable mail is actually deferred.

Q. Is it your contention that the use of hypotheticals in assigning costs in invalid?

A. It is my contention that the assignment or the attribution of costs should be based on actual costs and actual relationships between costs and pieces. The assignment of costs which are not actual ought to be on other than a cost basis.

Q. We are just talking about the assignment of cost. Is it your contention that the use of hypotheticals in assigning those costs is invalid? The use of all hypotheticals? Or is it a particular hypothetical?

MR. FANG: May we have a clarification of what Counsel means by the word "assignment," Mr. Chairman?

PRESIDING OFFICER FRITSCHLER: Mr. Mackiewicz?

MR. MACKIEWICZ: Assignment as used in the statute. I understand there is—on the basis of the statute, and on [R. 6363] the basis of past rate proceedings, I understand you usually had three tiers of costs, and one of them was the assignable costs, costs that could not be attributed. That is what I am talking about, is that second tier. I just want to know whether or not it is your contention that the use of all hypotheticals in the assignment of costs is invalid?

THE WITNESS: It is my position that hypotheticals can be used to measure actual differences in costs, but not to measure hypothetical differences in costs.

It is my position that the Postal Service should not be assigning hypothetical costs.

BY MR. MACKIEWICZ:

Q. Are you at all familiar with Witness Martin's testimony in this proceeding?

A. I am generally familiar with his testimony.

Q. I just would like to direct your attention to Witness Martin's testimony USPS-T-6, page 22. You don't need to have it before you, I will just quote the relevant section to which I want to refer your attention.

A. I would prefer to have it before me.

Q. I can give you my copy then.

A. Thank you.

Q. I would like to direct your attention specifically to page 22, lines 21 to 25.

(Document handed to witness by Counsel Mackiewicz)

[R. 6364] MR. MACKIEWICZ: I would like to read into the record as basis by my question the relevant sentence here, Mr. Chairman.

BY MR. MACKIEWICZ:

Q. It states, "The method I have employed to identify reasonably assignable costs in purchased transportation is to pose the question 'if preferential treatment were eliminated would nonattributable costs be reduced or eliminated'."

Now I would like to ask you, Mr. Alenier, isn't Witness Martin there posing a hypothetical in his attempt to identify reasonably assignable costs in purchased transportation?

A. He may be posing a hypothetical question but he is using it to identify actual differences in cost levels which result from preferential treatment.

Q. So your contention, therefore, in light of your previous answers to my questions, is that the use of hypotheticals is okay, or valid for purposes of determining attributable costs but not for reasonably assignable costs?

A. No, that is not what I said.

Q. Would you then—

A. I said the use of any method which would be reasonable can be an appropriate method if used to identify actual difference in cost levels.

In the case of service-related costs the differences [R. 6365] in cost levels themselves are hypothetical based on the assumption that all deferrable mail is in fact deferred.

Q. Then are you really claiming that it is the use of a three day-six day delivery hypothetical alone that is invalid? Would that be a better restatement of what you are trying to get across in that last sentence to your revised answer to DMMA Interrogatory 1-F?

A. I would not want anyone to misconstrue my response. That is essentially correct, but what I am saying is that the levels of costs measured by the three day-six day comparison are much much greater than the actual difference in cost which result from the deferral of mail at delivery units.

Q. You are not really claiming that the use of hypotheticals in general is invalid as an economic cost concept?

A. That is correct.

Q. Is it your position that an improved analysis of volume variable city carrier costs renders moot an earlier conclusion which was defended vigorously by the Postal Service before this Commission and the court regarding the assignment of nonvariable costs?

A. No, it is not.

Q. Mr. Alenier, I would like to turn your attention to another matter.

With reference to your response to OOC Interrogatory 23, is it your position that the difference in unit costs shown

* * * *

[R. 6676] varies, does not unutilized capacity also vary with volume?

A. In that sense it would vary inversely with volume.

Q. I think you commented this morning to Counsel for DMMA that service related costs were deemed unsatisfactory to you because they were based on a three day-six day hypothetical.

Isn't Mr. Martin's determination of reasonably assignable costs for certain preferential classes in segment 14 also based on a hypothetical? That is, what would happen were certain transportation segments not operated to provide service for preferential classes of mail?

A. That is not an accurate characterization of what I said this morning. I indicated that the use of hypotheticals could be appropriate, but that I did not feel that it was appropriate to estimate costs which were in fact hypothetical.

Q. Do you see any parallel between the three day-six day hypothetical which was employed in the last case for service-related costs, and Mr. Martin's use of a hypothetical with respect to preferential mail?

A. I see significant differences.

[R. 6677] Q. Do you see any similarities? Is it not avoidable cost procedure based upon a hypothetical what would happen were certain portions of transportation not to be operated, for example?

A. Not precisely, because the costs associated with those portions of transportation are there in the system. Those costs are associated with preferential treatment. In the case of service-related costs there is an assumption that certain portions of those costs result from the lack of ability to defer mail. In fact, very little mail in the postal system is deferred. So I think that are significant differences.

As I indicated earlier, there is nothing wrong with the use of a hypothetical to estimate actual costs.

Q. Mr. Martin is not using the hypothetical to measure actual costs, is he? He is using it to determine what costs would be avoided were certain inter-SCF segments not operated for purposes of handling preferential mail, isn't that true?

A. I am not certain whether he identified them as inter-SCF segments. He identified the costs as associated with preferential treatment, and he indicated that those costs are a result of those preferential treatment, but are not volume variable. So he reasonably assigned them.

Q. Putting aside his treatment of reasonably assignable costs let's stay with the concept of latent capacity, which I think you are most recent statement was that the unutilized

* * * *

[R. 6797] ever been done to determine whether specific costs are variable with volume?

A. Specific fixed costs constitute a very small proportion of Postal Service costs, and they are attributed to particular rate categories regardless of the degree to which they are variable.

Q. And that is because those costs are related solely to the provision of one type of service?

A. That is correct.

Q. So that if that type of service did not exist those costs would not exist?

A. That would be the assumption implicit in that attribution, yes.

Q. Certainly counsel have questioned you concerning your revisions to your answer to DMMA-1. I also would like to ask you a question concerning your new answer F. You state, "The principal policy consideration is that service-related costs are hypothetical, not actual."

Is that a cost policy in this proceeding adopted by the Postal Service?

A. Yes. It is.

Q. Would you define what you meant by hypothetical?

A. I believe I defined that the other day.

What I mean here is that the difference in cost between three days and six days of delivery is a hypothetical [R. 6798] difference. It is not based on any actual differences in levels of service.

Q. That is in fact very close to the definition you gave me. I wanted to go a step further with that thought.

When you say "The actual costs," the costs of the six day are actually incurred, are they not, today?

A. That is correct.

Q. So the cost of three day delivery are deemed hypothetical by you?

A. That doesn't exist today, the Postal Service doesn't deliver mail three days. But that is not precisely what I am saying.

Q. Would you elaborate on what you are saying then? I obviously did not understand.

A. What I am saying is that the computation of the difference between three days and six days of delivery is based on an assumption that all mail which is deferrable is in fact deferred. It is my position that the actual differences which would be calculated by using the actual numbers of pieces of mail that are deferred and the resultant costs associated with that deferral would be de minimis relative to the level of service-related costs by using the hypothetical three day-six day calculation.

Q. You recognize that in computing the three-day hypothetical costs in the last rate case there was no assumption.

Response Of USPS To Question Of Presiding Officer To Witness Alenier

Question for Witness Alenier

Q. Yesterday, Mr. Alenier, you commented on service-related costs and you concluded that the R77-1 three-day, six-day delivery criterion "is an inappropriate method for determining service-related costs." (Tr. 6359, lines 3 and 4)

You further testified in response to a question on how you reached this conclusion:

Over the past couple of years I have been doing extensive studies of city delivery carriers and one thing that I became very much aware of was that the fact that mail is deferrable is not the same thing as the fact of its actual deferral. And it is my belief that cost attribution and/or assignment based on Section 3622(b)3 of the Postal Reorganization Act ought to be based on cost causality. My conclusion is that the difference between three day and six day delivery is a hypothetical one, and the actual difference in costs which result from the actual act of deferring mail is a very small subpart of the cost estimates which are provided in this proceeding as service-related costs. (Tr. 6359, lines 6-17)

In the Commission's Recommended Decision in Docket No. R77-1, at the bottom of page 96 and the top of page 97 that Decision speaks of Mr. Jellison's testimony and says:

> In his opinion, if the nonpreferential service standards were applicable to all classes and sub-classes of mail, those nonpreferential standards could be met in full by the carriers' delivering the mail every other day resulting in a three-day per week delivery operation. He concluded, therefore, that the delivery function is affected primarily by the preferential mail requirement of every
>
> > day delivery rather than every other day. In other words, if all mail had non preferential service standards, the USPS would provide every other day delivery.

Mr. Alenier, your statement seems to amount to a reason for rejecting the service-related cost methodology. However,

your statement seems to miss witness Jellison's point in R77-1; that point is that the presence of preferencial (sic) service standards requires six-day a week delivery, while non-preferential service standards would only require three-days per week delivery.

Could you comment on Mr. Jellison's point and on what information you have which leads you to dismiss Mr. Jellison's reasoning and testimony, and this Commission's findings?

There is no inconsistency between Mr. Jellison's statement in Docket No. R77-1, cited in the Commission's *Recommended Decision*, and quoted above, and my position in this Docket.

Mr. Jellison observed that delivery currently was made six days a week and indicated that, operationally speaking, the Postal Service could deliver all mail according to nonpreferential standards using a three-day a week network. I do not dismiss his reasoning and testimony; rather I have serious reservations concerning identification as a practical matter of cost associated with delivery of preferential mail. Mr. Jellison's statements do not address that problem.

While the current delivery system operates six days a week, as indicated by Mr. Jellison, that fact does not apear relevant in determining the magnitude of so-called "service-related" costs. Recent public attention concerning five-day a week delivery suggests that the issue of the number of days per week required to deliver mail to preferential standards is open. If preferential standards can be met substantially with five-day a week delivery, the magnitude of service-related costs is much smaller—many hundreds of millions of dollars smaller—than calculated by the very rough approach used in Docket No. R77-1.

Additionally, the fact that a substantial portion of preferential mail might be delivered to standards with a four-day a week network, indicating that the amount of service-related costs is even smaller than that associated with five-day a week delivery, appears to require consideration.

The approach to determining "service-related" costs in the Commission's Docket No. R77-1 *Recommended Decision* understandably does not address these issues, attention being focused on the reasonableness of a three-day a week nonpreferential delivery system rather than the likelihood that preferential standards might substantially be met in a less than six-day a week delivery network. The approach, however, appears to overstate "service-related" costs and to discriminate against certain rate categories, since "service-related" costs relate only to mail categories that receive delivery according to preferential standards. The deficiency is sufficiently severe to warrant rejection of the "service-related" cost methodology even as a "first effort" today.

Testimony Of USPS Witness Allen (Direct)

[R. 22005] I. PROPOSED RATE LEVELS AND CLASSIFICATION CHANGES

Witness Cavallo established the test year revenue requirement and the testimony of witness Tolley forecasted specific volumes in the test year. I considered rate levels for the mail classes and subclasses by considering the testimony of witnesses Cavallo and Tolley and by considering the criteria of 39 U.S.C. § 3622(b).[1] After I established proposed rates, after-rates volumes were computed by witness Tolley and after-rates costs were computed by witness Dalton.

In this docket the attributable/assignable costs are 60.3 percent of the total revenue requirement before proposed rate increases. Because of public service appropriations and investment income, the amount of revenue requirement that must be covered by postage and fees is reduced from 100 percent to 96.8 percent. The difference between the full amount which must be covered by postage and fees (96.8 percent) and the level of attributable/assignable costs (60.3 percent) is the amount which must be covered by rate levels established above the level of attributable/assignable cost. Before rates, a uniform cost coverage of 160.5 percent[2] [R. 22006] is required if the Postal Service is to achieve revenues equivalent to costs in the test year. The same computation after considering proposed rate levels results in an average cost coverage of 161.8 percent to achieve a financial breakeven.

---

[1] In this process I also relied upon the Recommended Decision in Docket No. R77-1.

[2] The uniform cost coverage is calculated by dividing 96.8 percent by 60.3 percent.

As noted earlier in my testimony, the nine criteria of 39 U.S.C. § 3622(b) are considered when establishing cost coverages. These rate factors are:

1. The establishment and maintenance of a fair and equitable schedule;
2. the value of the mail service actually provided each class or type of mail service to both the sender and the recipient including, but not limited to the collection, mode of transportation, and priority of delivery;
3. the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
4. the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail other than letters;
5. the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
6. the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
7. simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

[R. 22026] **II. FIRST-CLASS MAIL**

A. Proposal Highlights

1. Letter mail

The Postal Service proposes that the rate for the first ounce of regular rate mail be raised to 20 cents from 15 cents and the rate for additional ounces be raised to 17 cents from 13 cents. The ounce-rate weight limit would remain 12 ounces. The proposed surcharge for nonstandard sized mail is 9 cents per piece, an increase from the current level of 7 cents.

2. Cards

The Postal Service proposes a rate of 13 cents for both postal cards (printed by the Postal Service) and post cards (privately printed). This represents an increase of 3 cents from the 10-cent rate now in effect.

3. Presorted mail

The discount for qualified mail presorted to 5-digit ZIP Code would be increased to 3 cents from 2 cents per piece for letter mail. An additional one-cent discount is proposed for first-class letter mail presorted to carrier routes. No change is proposed in the presort discount for post and postal cards. . . .

[R. 22038]

* * * * *

D. Financial summary

TABLE 4

ESTIMATED TOTAL COST AND REVENUES: TEST YEAR ($ Millions)

	Costs	Revenues[1]	Revenues As A Percent Of Costs
Without Rate Increases	8,241.3	10,494.5	127.4%
With Rate Increases[2]	7,722.2	12,996.6	168.3

[1]Includes domestic mail fees.
[2]Recognizes the lower volumes associated with proposed rates.

[R. 22039]

TABLE 5

ESTIMATED PER PIECE COSTS AND REVENUES: TEST YEAR

	Costs	Revenues[1]	Contribution To Institutional Costs	Percentage Rate Increase[2]
Letters and Sealed Parcels	15.02¢	23.64¢	8.62¢	35.2%
Presort Letters	7.90	17.71	9.81	31.7
Postal Cards	6.06	13.03	6.97	30.0
Post Cards	7.84	15.76	7.92	30.5
Presort Cards	6.59	12.10	5.51	33.1

[1]Includes domestic mail fees.
[2]Excludes domestic mail fees.

[R. 22122]

TABLE 34

PARCEL POST
PERCENTAGE OF PIECES, WEIGHT AND REVENUE
Fiscal Year 1979

	Total Mail	Fourth-Class Mail
Pieces	0.20%	33.16%
Weight	9.10%	44.01%
Revenue	2.36%	57.41%

D. Financial outlook

TABLE 35

ESTIMATED AGGREGATE COST AND REVENUES: TEST YEAR ($ Millions)

	Cost	Revenues[1]	Revenue As Percent of Costs
Without Rate Increases:	$347.4	$405.9	116.8%
With Proposed Rate Increases:	342.2	430.8	125.9

[1]Includes domestic mail fees.

TABLE 36

ESTIMATED PER PIECE COSTS AND REVENUES: TEST YEAR

Costs	Revenues[1]	Contribution To Institutional Costs	Percent Rate[2] Increase
$1.86	$2.34	$0.48	8.3%

[1]Includes domestic mail fees.
[2]Excludes domestic mail fees.

[R. 22174]

SUMMARY OF ESTIMATED TEST YEAR FINANCES
(Dollars in Thousands)

Line	Description	Proposed Full Rights			
		Attributable Assignable Costs	Revenues[1] [2]	Percent of Costs	Revenue Contribution To Other Costs
	(1)	(2)	(3)	(4)	(5)
1	First-class mail	$ 7,722,197	$12,996,621	168.30%	$5,274,424
2	Priority mail	440,365	761,612	172.95	321,247
3	Express mail	138,982	332,551	239.28	193,569
4	Mailgrams	4,423	20,547	464.55	16,124
5	Second-class mail				
6	In county	50,496[5]	49,071	97.18	- 1,425
7	Outside county				
8	Nonprofit	179,649[5]	176,854	98.44	- 2,795
9	Classroom	4,425[5]	4,377	98.91	- 48
10	Regular-rate	551,104	752,181	136.49	201,077
11	Transient rate	10,915	10,647	97.54	- 268
12	Total	796,589	993,130	124.67[6]	196,541
13	Controlled circulation[7]				
14	Third-class mail				
15	Single piece	185,552	189,642	102.20	4,090
16	Bulk-rate regular	1,257,718	2,201,303	175.02	943,585
17	Bulk-rate nonprofit	489,732[5]	501,731	102.45	11,999
18	Total	1,933,002	2,892,676	149.65[6]	959,674
19	Fourth-class mail				
20	Parcels	342,203	431,084	125.97	88,881
21	Bound printed matter	29,981	62,100	207.13	32,119
22	Special rate	232,519	268,995	115.69	36,476
23	Library rate	58,664[5]	57,550	98.10	- 1,114
24	Total	663,367	819,729	123.54[6]	156,362
25	Federal government mail	373,474	925,792	247.89	552,318
26	Free-for-the-blind, etc.	10,182	—	—	- 10,182
27	International mail	746,148	898,712	120.45	- 152,564
28	Special services	758,538	800,920	105.56	42,382
29	Other income	—	79,314	—	79,314
30	Other costs assigned to preferred rate mail	25,707	—	—	- 25,707
31	Attributable/assignable costs and revenues	13,612,974	21,521,604	158.10	7,908,620
32	Total other costs	9,349,722	—	—	- 9,349,722
33	Investment income	—	230,446	—	230,446
34	Appropriations:				
35	Public services	—	692,898	—	692,898
36	Continuing	—	518,785	—	518,785
37	GRAND TOTAL	$22,962,696	$22,963,733	100.00%	$ 1,037

[1] Includes distribution of related fees to subclasses.

[2] Includes $345.4 million revenue forgone appropriation attributable to phased rates. Continuing appropriations are not distributed to classes or subclasses (see line 36).

[4]Attributable costs only. See line 30 for costs reasonably assigned to preferred-rate mail.
[4]Does not include share of continuing appropriations (line 36). If these amounts were added, the following costs coverage would apply; second class, 131.03 percent, third class, 127.92 percent, fourth class, 124.68 percent.
[5]Includes 318.8 million revenue forgone appropriation attributable to phased rates. Continuing appropriations are not distributed to classes or subclasses (see line 36).
[6]Does not include share of continuing appropriation (line 36). If these amounts were added, the following cost coverage would apply; second class, 132.32 percent; third class, 170.84 percent, fourth class, 128.43 percent.
[7]Included in regular-rate second-class mail (line 10).

[R. 22178]

SUMMARY OF RAGE CHANGES
PROPOSED OVER CURRENT FULL RATES

Mail Category	Percentage Rate Change
First Class	33.1%
Priority	32.0
Express Mail	15.1
Second Class:	
In County	– 15.2
Outside	
Nonprofit	-- 6.3
Classroom	– 5.2
Regular rate[1]	1.9
Transient Rate	107.1
Controlled Circulation[1]	
Third Class:	
Single Piece	74.8
Bulk Rate Regular	17.7
Bulk Rate Nonprofit	– 5.7
Fourth Class:	
Parcel Post	8.3
Bound Printed Matter	-0-
Special Rate	0.6
Library Rate	7.7
Federal Government Mail	28.4
International Mail	55.0

[1]Includes controlled circulation in second class regular rate.

Testimony of USPS Witness Allen (Cross)

[R. 3738] Allen Answer to DMMA Interrogatory No. 18

Given the criteria of § 3622(b) and the facts, observations and ratemaking constraints which you relied upon to distribute approximately $8.4 billion of institutional costs to the various classes of mail and other services, do you believe the Commission—using the same facts, observations and ratemaking constraints—could independently reconstruct the derivation of that distribution of institutional costs? Alternatively, would you say that your proposed distribution of these $8.4 billion of costs is largely a matter of personal judgments? If your answer to the first of these questions is in the affirmative, please explain in detail how the Commission could independently replicate the distribution of $8.4 billion of institutional costs which you propose.

No. Such a duplication of the basis for cost coverage levels was possible prior to the court decision in NAGCP I. At the present time the procedure is to consider the criteria of § 3622(b), facts, observations and ratemaking constraints and then to make a judgment concerning the appropriate cost coverage level.

* * * *

[R. 3832] which has influence in this rate case, and there was no reason for me to do that.

Q. Did you discuss with anybody at the Postal Service whether or not you should take it into account?

A. In establishing cost coverages, you mean?

Q. Yes.

A. I don't recall any such discussion, no.

Q. I would like you now to turn to your answer to DMMA Interrogatory i8.

A. I have that.

Q. You state there, do you not, that the Commission could not independently reconstruct the distribution of some 8.4 million dollars of institutional costs as proposed in your testimony?

A. That is correct. As I pointed out there, the process of applying these factors is essentially a judgment process, and is not quantified.

Q. Since you relied upon personal judgment would you agree that well-intentioned reasonable persons using the same facts and observations that were available to you could interpret the noncost rate making criteria of the Act and come up with a significantly different distribution of that 8.4 million dollars?

A. Certainly it is possible, but it is my belief that well-intentioned people properly applying the criteria and the [R. 3833] information available would come up with something which was not a great deal different.

Q. In your answer to this interrogatory are you saying that the procedure sanctioned by the court in NAGCP I authorizes you to exercise unstructured discretion in assigning some 8.4 million dollars of institutional costs even though that exercise and discretion cannot be replicated by the Commission?

MS. BECK: I am going to object to that question. I am not sure this witness is that familiar with the NAGCP I decision.

MR. ACKERLY: He referenced NAGCP-I in the answer to interrogatory, Counsel.

COMMISSIONER O'DOHERTY: Objection sustained.

BY MR. ACKERLY:

Q. Is there any structure within which you exercise this discretion, Mr. Allen?

A. I don't understand. Is there any structure within—I am sorry, I don't understand.

Q. You stated that you relied upon your personal judgment to distribute some 8.4 million dollars of institutional costs, is that correct?

A. To establish the markup factors for each of the classes of mail, yes.

Q. Were there any quantitative limitations upon the [R. 3834] exercise of your personal judgment in making that distribution?

A. Yes.

Q. What were they?

A. I pointed out in my testimony there was a constraint that no nonpreferred mail class would have a descrease in rates.

I indicated yesterday that the first ounce of First Class mail was not my determination, although I think I would have determined exactly the same rate.

And a further constraint was the establishing of the three cents discount for First Class presorted mail to three and five digits.

Q. Was the constraint established in the same method that the 20 cents rate for First Class was established?

A. Was it established in the same method?

Q. Yes.

A. It was established in a different time.

Q. But something the Governors decided for you?

A. Yes.

Q. It was not a judgment that you made, is that correct?

A. That is right, it was judgment of the Governors.

Q. Were there any other quantitative restraints?

A. I cannot think of any other quantitative restraints.

Q. In other words, there were no restraints upon the exercise of your personal judgment except those that you just mentioned in distributing these $8.4 million of institutional [R. 3835] costs? And by restraints I am talking about quantitative restraints, not qualitative.

A. I do not recall any other quantitative restraints on the exercise of my judgment. I did not do it in isolation. I don't mean to leave the impression that I went into a room somewhere and did this. I continually consulted with other people. Consulted frequently with the Assistant Postmaster General for rates, for instance. But there was no constraint imposed by him.

Q. Let me put it to you this way: Aren't you putting this Commission between a rock and a hard place. On the one hand I will represent to you that NAGCP-I is footnote 94, page 918 and 919, 415-F section is quoted by the Commission in its recommended Decision in R77-1 at pages 161 through 162, that the Court of Appeals in NAGCP-I expresses "serious doubt" about the inverse elasticity rule? That is on the one hand.

On the other hand the same Court of Appeals in NAGCP-3, the citation here is page 399, language reminiscent of Judge Bazzelon's opinion in the appeal of the first rate case, criticizes the unstructured and unreviewable exercise of discretion over a very large portion of the Postal Service revenue requirement. And doesn't this create a problem?

Doesn't it put the Commission between a rock and a hard place?

Now, a partial solution of this problem, of the [R. 3836] unreviewable discretion over a large portion of Postal Service revenue requirement was alleviated by the use of service related costs which reduce the number of dollars of residual costs that had to be distributed solely by the use of unstructured judgment.

That causes me to worry about the philosophy that you exercised, and that underlies the setting of your rates.

You are abandoning on the one hand the service related cost concept, thereby increasing the amount of residual costs that have to be distributed by discretion, and on the other hand you are not going back to any principle, as was the case with the inverse elasticity rule, which would help you structure the exercise of the discretion in the distribution of the large amount of institutional costs.

My question is this: What is your philosophy and how do you resolve this apparent inconsistency?

Do you really think it is the intent of the statute that the Postal Service go back to a strictly personal judgmental distribution of such a large portion of the Postal Service revenue requirement?

MR. FELDMAN: Before the witness gives us his philosophy, if I might ask the Chair could the witness speak up? I think some of the responses are being lost back here.

PRESIDING OFFICER FRITSCHLER: Perhaps if you tilted the microphone up a little more, Mr. Allen, it would work [R. 3837] better.

MS. BECK: Before the witness gives his philosophy as well I am going to object to any attempt to make the witness discuss the intent of the statute. The witness is not a lawyer. And many lawyers have had problems deciding what the intent of the statute is among themselves.

MR. ACKERLY: Mr. Chairman, I think that the witness' understanding of what the statute requires, since he is the primary pricing witness here, is very relevant, and I believe that a statement as to his basic approach in the context of his understanding of the statute is very relevant.

PRESIDING OFFICER FRITSCHLER: I agree with Mr. Ackerly. It seems to me this is a very important question. I think the witness should answer it.

THE WITNESS I have a strong personal preference for a process for setting cost coverages which can be duplicated and

which has in its basis some substantial quantitative base, that is responsive to sound, good, economic principles for establishing cost coverages.

It is my hope that the Postal Service and this Commission in the future through this process will have such a basis. It is my understanding that at the present time a basis that we did have we cannot use, and that it is my understanding that the application of judgment with regard to the individual criteria of 3622(b) is the appropriate process to use in [R. 3838] establishing these cost coverages.

BY MR. ACKERLY:

Q. I suggest to you, Mr. Allen, that you are, in choosing that procedure, retrogressing to a less structured approach than even that that was used in R71-1.

In the last several rate cases there have been two approaches that the Postal Service has used to cut down the scope of the problem.

One was the institution of service related costs which reduced the amount of residual costs to a lower figure.

The other was the use of the inverse elasticity rule which applied some mathematical constraints upon the distribution of institutional costs.

Prior to that there was a ranking in terms of elasticity in the first couple of rate cases.

The approach that you have chosen not only abandons service related costs, and then does not go back to the inverse elasticity rule, it doesn't even use elasticities as a significant factor for the distribution of institutional costs, and in fact realize solely on your personal judgment.

And my question is do you think that the method that you have utilized this time is better from any point of view than any of those three methods that I have just set forth for you?

MS. BECK: I am going to point out that this witness [R. 3839] has not abandoned service related costs, Mr. Chairman. It was not within his province to abandon service related costs. The abandonment, if you will, of service related costs was a situation made at all levels, including the highest, of Postal Service management.

So with that caveat I would like to have that question rephrased, if Counsel would.

MR. ACKERLY: And I would be happy to rephrase the question.

BY MR. ACKERLY:

Q. In view of the fact that service related costs were not used in determining attributable/assignable costs, you did not go back, did you, to the two rate making pricing principles that were used prior to the first time that the Postal Service and this Commission had utilized service related costs.

Those two methods were, first, chronologically, a general ranking by class in terms of elasticity, and second, the inverse elasticity rule, which was a mathematically more sophisticated approach to the first method.

My question was in view of the lack of usage of service related costs this time why didn't you use one of the other two methods, and why do you consider the method that you did use superior?

A. I have never said I considered the method I used superior. It is my understanding it is not possible to use the [R. 3840] inverse elasticity approach.

Q. For legal reasons?

A. For legal reasons. And it is my understanding that there is a great deal of doubt in using the price elasticities to structure the markups. And that is is not an acceptable method to use as well. And we have the method that I used. I would prefer to use either of the other two methods.

Q. Thank you, Mr. Allen. Now I would like to change the focus and direct your attention to page 112 of your testimony, which I believe was recently revised on July 21.

A. The revisions were not matters of substance, they were slight changes in the numbers, in three of the numbers on that page. The number changes had been previously pointed out in interrogatories.

Q. I believe that is correct, Mr. Allen. Yes, they are the percentage figures and the table reference.

A. That is correct.

Q. The portion of your testimony that I am focusing on is that on lines 18 through 21 where you say, "In my judgment the rate differences should not be increased above the levels proposed because to do so would unjustifiably burden the 'all other' mail group."

That is the end of the quote from your testimony.

I take it first of all what you are referring to when you mention rate differences is the rate differences between the

* * * *

[R. 3983] BY MR. WEBBER:

Q. Mr. Allen, would you refer to page 9 of your testimony, Line 15. There is a sentence which states, "The average percentage increase in rates for first class mail is approximately the same as the systemwide average increase."

A. Yes, sir.

Q. I find that statement to be misleading. I don't want the Commission to be misled, and I am sure you don't either. So let's understand the specifics of that.

The average percentage increase for first class mail is 33 per cent, is that correct?

A. That is correct.

Q. And in answer to NAGCP interrogatory number 5, I believe, you said that the systemwide average percentage increase was in the range of 26 to 29 per cent.

A. That is correct.

Q. And that depends on how you calculate it?

A. That is correct.

Q. Now, that included in that percentage first class mail, did it not?

A. Yes it did.

Q. And is it your testimony that 26 to 29 per cent is approximately the same as 33 per cent.

A. That was what I was addressing in line 15 and 16.

Q. So your answer is yes?

[R. 3984] A. That is what I just said, I think. Yes.

Q. I think there is room for disagreement, but let me take it one more step. In response to NAGCP interrogatory number 26 you were requested for information as to the average increase for all mail except first class.

And I think your response was 17 per cent.

Would you like to verify that?

A. I remember something about that. So that is about what I recall, yes.

Q. Well, subject to check let's use 17 per cent.

Now, first of all I am curious because in your initial answer with regard to systemwide increase you gave me a range of 26 to 29 per cent, but for this followup you gave me a single number, 17 per cent.

Why did I not get a range for the second answer?

A. You probably should have. A range required some time to calculate, the various possibilities. And to be perfectly frank

the burden of putting out these interrogatories was such that I did not have my time or staff time to provide the range.

I provided that answer on the basis of what is normally commonly thought of as the most popular way, I would say, to calculate the average. I calculated it on that basis.

Q. Does that 17 per cent lie at the top of the range or the bottom of the range?

[R. 3985] A. That comparable procedure used in calculating the range of what was it—26 to 29?

Q. Yes.

A. —gave me an answer of 27 per cent.

Q. Let's take that 17 per cent figure. Would you agree, sir, that the 17 per cent for all mail except first call is not, to use your words, approximately the same as the average percentage increase for first class?

A. Yes. And perhaps I should have here compared the average for first class with the average for the system without first class mail. I did not do it. I grant that that was a bit awkward and perhaps I should have.

Making that comparison would be a comparison of 33 per cent with 18 per cent, which is somewhat greater. It is the basic problem we face, that first class is and does dominate the mail.

And you are right, it is a major contributor to that average.

Testimony Of USPS Witness Dalton (Direct)

[R. 21620] Estimating Future Year Attributable Costs

Base year 1979 attributable costs for each segment, by class and subclass of mail and type of service, are presented in exhibit USPS-7F to Mr. Alenier's testimony. The attributable costs presented in this exhibit are composed of three distinct types of attributable costs: costs that vary in the test year due to test year volume changes (short-run variable); costs that do not vary in the test year due to test year volume changes but change in later periods as the system adjusts to new volume levels (longer-run variable); and costs which, although not variable with volume, relate solely to providing one class of mail or special service (specific-fixed costs). In estimating the level of future year attributable costs, each type of attributable cost receives separate consideration.

Test year estimates for short-run variable costs are determined by adjusting base year variable costs for the effect of changes in volumes by class and subclass of mail and type of service and for the effect of changes in cost level, nonvolume workload and other factors, and employee productivity from the base year to the test year.

[R. 21621] Longer-run variable costs are not influenced by volume changes in the same manner as short-run variable costs. Test year estimates of these costs, therefore, are not generated directly by adjusting base year 1979 longer-run cost data to test year levels. Rather, test year longer-run variable costs are determined independently in a manner consistent with the attribution of these costs in the base year.

Test year estimates for specific-fixed costs are developed by adjusting base year specific-fixed costs for the effect of changes in cost level, number of workdays, employee productivity, and other factors. Specific-fixed costs are not adjusted for the effect of changes in volume because such costs are not responsive to volume changes.

Estimates for each type of attributable cost are developed for FY 1980 and at both current and proposed rates for the test year. The procedures generally employed in developing forecasts of attributable costs are summarized below as follows:

[R. 21685]

SUMMARY OF INCOME AND COSTS FOR MAJOR SERVICE CATEGORIES
TEST YEAR
Proposed Rates
(In millions)

	Revenues[1]	Attributable/ Assignable Costs	Revenue Contribution Institutional Cost	Revenue as a Percent of Attributable/ Assignable Costs
First-Class Mail	$12,996.6	$ 7,722.2	$5,274.4	168.3
Priority Mail	761.6	440.4	321.2	172.9
Express Mail	332.6	139.0	193.6	239.3
Mailgrams	20.5	4.4	16.1	465.9
Second-class mail:				
Within the county	47.1	52.1	(5.0)	90.4
Outside the county				
Nonprofit publications	172.9	186.5	(13.6)	92.7
Classroom publications	4.3	5.2	(.9)	582.7F
Regular-rate publications	564.8	436.0	128.8	129.5
Fees	13.6	—	13.6	—
Total publishers' mail	802.7[2]	679.8	122.9	118.1
Transient mail	10.6	10.9	(.3)	97.2
Total second-class mail	813.3	690.7	122.6	117.8

[R. 21685]

SUMMARY OF INCOME AND COSTS FOR MAJOR SERVICE CATEGORIES—*Continued*

TEST YEAR
Proposed Rates
(In millions)

	Revenues[1]	Attributable/ Assignable Costs	Revenue Contribution to Institutional Cost	Revenue as a Percent of Attributable/ Assignable Costs
Controlled circulation publications	179.8	115.1	64.7	156.2
Third-class mail:				
Single piece rate	189.0	185.6	3.4	101.8
Bulk rate - regular	1,474.5	1,110.0	364.5	132.8
Bulk rate - regular presort	709.1	147.7	561.4	480.1
Bulk rate - nonprofit	465.7	496.1	(30.4)	93.9
Bulk rate - nonprofit presort	20.3	8.3	12.0	244.6
Fees	30.1	—	30.1	—
Total third-class mail	2,888.7	1,947.7	941.0	148.3
Fourth-class mail:				
Parcels (zone rate)	430.8[3]	342.2	88.6	125.9
Bound printed matter	62.1	30.0	32.1	207.0
Total zone-rate mail	492.9	372.2	120.7	132.4
Special fourth-class rate	269.0	232.5	36.5	115.7

	Revenues[1]	Attributable/ Assignable Costs	Revenue Contribution to Institutional Cost	Revenue as a Percent of Attributable/ Assignable Costs
Library rate	57.6	60.4	(2.8)	95.4
Total fourth-class mail	819.4	665.1	154.3	123.2
Government mail	925.8	373.5	552.3	247.9
Free mail for the blind and handicapped	—	10.2	(10.2)	—
International mail	898.7	746.1[4]	152.6	120.5
Total mail	20,636.2	12,854.4	7,781.8	160.5
Special services	800.9	758.5	42.4	105.6
Miscellaneous items	79.3[5]	—	79.3	—
Total mail and services	21,516.5	13,612.9	7,903.6	158.1
Appropriations: Revenue forgone	538.8	—	518.8	—
Public service	692.9	—	629.9	—
Total operating income	22,728.2	—	—	—
Investment income	230.4	—	230.4	—
Total	$22,958.6	13,612.9	$9,345.7	168.7%
Institutional costs		9,349.8		
Total operating expense		$22,96[illegible]7[6]		

[R. 21686]

DETAIL OF ATTRIBUTABLE COSTS FOR MAJOR SERVICE CATEGORIES
TEST YEAR
Proposed Rates
(In thousands)

	Variable Cost (Short-Run)				
	Direct and Indirect	Transportation	Longer-Run Attributable	Specific Fixed	Total Attributable
First-Class Mail	$5,953,168	$296,928	$1,203,963	$ —	$7,454,059
Priority Mail	155,050	201,738	64,688	—	421,476
Express Mail	60,702	45,555	10,287	—	116,544
Mailgrams	3,585	—	709	—	4,294
Second-class mail:					
Within the county	41,282	97	9,117	—	50,496
Outside the county:					
Nonprofit publications	133,362	16,511	29,776	—	179,649
Classroom publications	2,130	1,750	545	—	4,425
Regular-rate publications	297,927	24,875	65,064	—	387,866
Total publishers' mail	474,701	43,233	104,502	—	622,436
Transient mail	8,384	182	1,864	—	10,430
Total second-class mail	483,085	43,415	106,366	—	632,866
Controlled circulation publications	76,161	17,912	17,665	—	111,738

	Variable Cost (Short-Run)				
	Direct and Indirect	Transportation	Longer-Run Attributable	Specific Fixed	Total Attributable
Third-class mail:					
Single piece rate	144,397	1,658	34,093	—	180,148
Bulk rate - regular	855,284	41,647	180,737	—	1,077,668
Bulk rate - regular presort	96,696	18,738	27,983	—	143,417
Bulk rate - nonprofit	390,479	7,767	83,409	—	481,655
Bulk rate - nonprofit presort	5,446	1,055	1,576	—	8,077
Total third-class mail	1,492,302	70,865	327,798	—	1,890,965
Fourth-class mail:					
Parcels (zone rate)	184,583	67,539	80,114	—	332,236
Bound printed matter	18,158	5,165	5,785	—	29,108
Total zone-rate mail	202,741	72,704	85,899	—	361,344
Special fourth-class rate	135,051	31,008	59,688	—	225,747
Library rate	33,782	10,901	13,981	—	58,664
Total fourth-class mail	371,574	114,613	159,568	—	645,755
Government mail	251,695	48,416	59,447	—	359,558
Free mail for the blind and handicapped	6,312	1,361	2,212	—	9,885
International mail	232,378	431,077	58,534	—	721,989
Special and other services	402,434	—	231,723	73,452	707,609
Total mail and services	$9,488,446	$1,271,880	$2,242,960	$73,452	$13,076,738

[R. 21688]

SUMMARY OF ACCRUED COSTS BY SEGMENTS AND COMPONENTS DETAILING ATTRIBUTABLE COSTS
TEST YEAR
Proposed Rates
(In thousands)

Cost Segments and Components	Accrued Costs	Attributable Costs				All Other Costs
		Variable (Short and Longer-Run)			Specific Fixed	
		Direct	Indirect	Total		
1. Postmasters	$764,376	$ —	$142,640	$142,640	$ —	$621,736
2. Supervisors						
Mail Processing	421,307	—	421,131	421,131	—	176
Window Service	57,874	—	26,030	26,030	—	31,844
Administration and Support						
Time and Attendance	108,799	—	66,958	66,958	—	41,841
Specific Fixed	5,632	—	—	—	5,632	—
Local Services						
City Carriers						
In-Office	77,441	—	75,497	75,497	—	1,944
Parcels and Accountables	3,652	—	3,625	3,625	—	27
Other Variable Street	158,504	—	41,770	41,770	—	116,734

Cost Segments and Components	Accrued Costs	Attributable Costs				All Other Costs
		Variable (Short and Longer-Run)			Specific Fixed	
		Direct	Indirect	Total		
Special Delivery Messengers						
In-Office	171	—	69	69	—	102
Street	1,882	—	734	734	—	1,148
Other Supervisors and Technicians	503,643	—	143,380	143,380	—	360,263
Total Supervisors	1,338,905	—	779,194	779,194	5,632	554,079
3. Clerks and Mailhandlers, CAG A-J Offices						
Mail Processing	4,974,255	4,603,147	353,560	4,961,707	28	12,520
Window Service	760,691	342,154	—	342,154	—	418,537
Administrative Support and Miscellaneous	1,291,169	—	356,556	356,556	62,664	871,949
Total Clerks	7,026,115	4,950,301	710,116	5,660,417	62,692	1,303,006
4. Clerks, CAG K Offices	76,721	49,816	—	49,816	—	26,905
6. City Delivery Carriers In-Office	1,518,989	1,381,371	91,299	1,472,670	—	46,319
7. City Delivery Carriers Out-of-Office	3,018,355	67,346	777,511	844,857	—	2,173,498
Total City Carriers	4,357,344	1,448,717	868,810	2,317,527	—	2,219,817

[R. 21688]

SUMMARY OF ACCRUED COSTS BY SEGMENTS AND COMPONENTS DETAILING ATTRIBUTABLE COSTS—*Continued*

TEST YEAR

Proposed Rates

(In thousands)

Cost Segments and Components	Accrued Costs	Attributable Costs				
		Variable (Short and Longer-Run)			Specific Fixed	All Other Costs
		Direct	Indirect	Total		
8. Vehicle Service Drivers.....	154,957	25,104	—	25,104	—	129,853
9. Special Delivery Messengers						
In-Office.....	6,348	2,443	—	2,443	—	3,905
Street.....	67,302	26,251	—	26,251	—	41,051
Equipment Maintenance and Fees.....	550	337	—	337	—	213
Total Special Delivery Messengers	74,200	29,031	—	29,031	—	45,169

[R. 21689]

SUMMARY OF ACCRUED COSTS BY SEGMENTS AND COMPONENTS DETAILING ATTRIBUTABLE COSTS—*Continued*

TEST YEAR

Proposed Rates

(In thousands)

Cost Segments and Components	Accrued Costs	Attributable Costs				All Other Costs
		Variable (Short and Longer-Run)			Specific Fixed	
		Direct	Indirect	Total		
10. Rural Carriers						
Heavy Duty	$823,355	$233,911	$—	$233,911	$—	$589,444
Other-Routes	168,309	44,030	—	44,030	—	124,279
Equipment Maintenance Allowance	286,793	—	—	—	—	286,793
Total Rural Carriers	1,278,457	277,941	—	277,941	—	1,000,516
11. Custodial (maintenance) Service	719,984	—	321,659	321,659	—	398,325
12. Motor Vehicle Service						
City Delivery Vehicles	202,188	—	104,788	104,788	—	97,400
Special Delivery Vehicle	6,219	—	2,433	2,433	—	3,786
All Other	107,871	—	—	—	—	107,871
Total Motor Vehicle	316,278	—	107,221	107,221	—	209,057

[R. 21689]

SUMMARY OF ACCRUED COSTS BY SEGMENTS AND COMPONENTS DETAILING ATTRIBUTABLE COSTS—*Continued*

TEST YEAR

Proposed Rates

(In thousands)

Cost Segments and Components	Accrued Costs	Attributable Costs				
		Variable (Short and Longer-Run)			Specific Fixed	All Other Costs
		Direct	Indirect	Total		
13. Miscellaneous Operating Expenses						
Carfare, Tolls and Ferriage..	17,709	—	3,492	3,492	—	14,217
Other.....	52,683	—	—	—	—	52,683
Total Miscellaneous Operating Expenses	70,392	—	3,492	3,492	—	66,900
14. Transportation						
Domestic Airmail	624,920	613,232	—	613,232	—	11,688
Foreign Airmail	164,722	164,722	—	164,722	—	—
Railroad Line Haul and Other Service.....	138,539	95,092	—	95,092	—	43,447
Foreign Water.....	214,244	214,244	—	214,244	—	—

Cost Segments and Components	Accrued Costs	Attributable Costs				
		Variable (Short and Longer-Run)			Specific Fixed	All Other Costs
		Direct	Indirect	Total		
Domestic Water	8,324	7,756	—	7,756	—	568
Contract Highway Service ...	568,338	181,311	—	181,311	—	387,027
Total Transportation.....	1,719,087	1,276,357	—	1,276,357	—	442,730
15. Building Occupancy						
Rents, Fuel and Utilities	543,806	—	436,819	436,819	—	106,987
Other.....	47,720	—	—	—	—	47,720
Total Building Occupancy ..	591,526	—	436,819	436,819	—	154,707

[R. 21690]

SUMMARY OF ACCRUED COSTS BY SEGMENTS AND COMPONENTS DETAILING ATTRIBUTABLE COSTS—*Continued*

TEST YEAR

Proposed Rates

(In thousands)

Cost Segments and Components	Accrued Costs	Attributable Costs				
		Variable (Short and Longer-Run)			Specific Fixed	All Other Costs
		Direct	Indirect	Total		
16. Supplies and Services	$ 345,965	$ 1,715	$ 118,309	$ 120,024	$ —	$ 225,941
17. Research and Development	43,302	—	—	—	—	43,302
18. Administration and Regional Operations Headquarters	374,068	—	100,008	100,008	5,128	268,932
Postal Service Personnel & Benefits	2,062,052	—	1,156,259	1,156,259	—	905,793
Total Administration and Regional	2,436,120	—	1,256,267	1,256,267	5,128	1,174,725
19. Support Services	5,818	—	—	—	—	5,818

Cost Segments and Components	Accrued Costs	Attributable Costs				
		Variable (Short and Longer-Run)			Specific Fixed	All Other Costs
		Direct	Indirect	Total		
20. Depreciation and Service Wide Costs						
Depreciation	263,916	—	207,054	207,054	—	56,862
Other	89,722	33,363	27,398	60,761	—	28,961
Insurance Claims, Write Offs	11,684	—	—	—	—	11,684
Reimbursements	(6,777(	—	—	—	—	(6,777)
Total Depreciation and Service Wide Costs	358,545	33,363	234,452	267,815	—	90,730
Total Accrued Cost	21,858,092	8,092,345	4,978,979	13,071,324	73,452	8,713,316
Final Adjustments	—	—	(68,038)	(68,038)	—	68,038
Adjusted Grand Total	$21,858,092	$8,092,345	$4,910,941	$13,003,286	$73,452	$8,781,354

[R. 21691]

FOOTNOTES TO SUMMARY STATEMENTS
TEST YEAR
Proposed Rates

All figures in the statements are rounded; detail may not add to totals. Percents are rounded to nearest decimal.

NA Denotes not applicable.

– Denotes zero value.

( ) Denotes negative value.

[1]Fees associated with a specific class of mail are included in the reported revenue for that class. Such fees are also included in the reported revenue for a particular subclass if applicable.

[2]Includes revenues and costs for sample copies which are commingled with publishers' rate mailings.

[3]Revenues include Parcel Air Lift (PAL) fees of $522(000) and special handling fees of $10,086(000).

[4]Includes costs attributable/assignable to both U.S. and foreign-origin mail. Volume statistics, however, do not include foreign-origin mail.

[5]Miscellaneous items include philatelic sales, fees, fines, sales of parcel post and unclaimed money from dead letter and services performed for government agencies and private contractors.

[6]Includes recovery of prior year losses of $448.9 million, and contingency provision of $655.7 million.

[R. 17,500 Revised 11/14/80] refuses to make the cost distributions his own methodology requires. Section I.C., following, discusses the specifics of his failure to attribute or assign costs that under his methodology require such treatment. This failure and the fact that average total costs are at core a fully distributed cost methodology lead to the conclusion that Mr. Robertson's costing methodology is inappropriate for postal ratemaking. His fully distributed cost approach also is impermissible under the Act since its adoption would leave insufficient residual costs for application of the noncost ratemaking factors of section 3622(b). [1]

2. "Average Total Costs" Are Not Suited To Meet Postal Ratemaking Objectives Of Economic Efficiency And Nondiscrimination In Pricing

With respect to the assertion of a "fair-cost-apportionment objective" of postal ratemaking, Mr. Robertson cites page 403 of *NAGCP* III as his authority. A reading of that page reveals no reference to "fair-cost-apportionment." The page is a part of the Court's discussion headed "Marginal Cost Pricing," a discourse that ends with the Court concluding:

> [R. 17,501 Revised 11/14/80] It [the Court in *NAGCP* I [2]] rejected the effort to assign almost half the costs of USPS on the basis of relative inelasticities of demand as inappropriate, as in effect permitting a discretion barred by the Act . . . [3]

---

[1] *See* Docket No. R77-1, Postal Rate Commission Opinion (hereinafter "*Opinion*"), Vol. I at 103.

[2] *Associated Third Class Mail Users* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated and remanded in part*, 434 U.S. 884 (1977), *aff'd*, ____ F.2d ____ (D.C. Cir. Oct. 3, 1980) (hereinafter "*NAGCP* I").

[3] *NAGCP* III at 404.

The Court's discussion generally is about pricing and specifically is about the allocation of residual costs to the mail categories. Its discussion of marginal costs is in the context of its review of the *NAGCP* I ruling concerning the apportionment of unattributed costs by use of inverse elasticity. Nothing in *NAGCP* III indicates that "fairness" is a criterion to be applied in postal *costing* methodology, or even to be applied in the allocation of residual costs.

A proper reading of *NAGCP* III indicates clearly that economic efficiency is an important part of postal ratemaking. Reacting in *NAGCP* III to the Commission's observation in Docket No. R77-1 that *NAGCP* I foreclosed adherence to marginal cost pricing,[4] the Court said:

> [R. 17,502 Revised 11/14/80] We are also concerned that our ruling may have been carried too far, beyond what was originally envisioned. We would not wish our rulings to result, by virtue of misapprehension, in a loss of efficiency that was not required by or implicit in the statutory mandates.[5]

At any rate, "fair-cost-apportionment" is not an objective in postal ratemaking. Rather, the objectives are the prevention of undue discrimination among mail classes *and* economic efficiency.[6] Mr. Robertson's costing methodology does not meet these criteria.

Since "fair-cost-apportionment" is not the primary or controlling function of postal rates, the most relevant costs are not average total costs. Even if "fair-cost-apportionment" were the goal of postal cost determination, which it is not, the economic authority cited by Mr. Robertson does not support the use of "average total costs" to meet that alleged objective in the particular context of postal ratemaking.

---

[4] *See* Docket No. R77-1, Opinion at 75-82.

[5] *NAGCP* III at 402.

[6] *Id.* at 403, 404.

Mr. Robertson cites J. Bonbright, *supra* p. 10 n.3, at 80, for support. That page contains a discussion of ratemaking policy that distinguishes two cost-price standards: reasonable rates for users of [R. 17,503] utility service and reasonable compensation to producers of service. Regarding the latter:

> This means among other things, (a) that the relevant costs are enterpriser costs and not social costs, (b) that the important equation is between total revenues and total costs rather than between the rate for any specific service and the cost of rendering this particular service, and (c) that "cost of service" must be interpreted somewhat broadly to include an allowance for a capital-attracting rate of return. It also means that a strong, even if not conclusive, case can be made for an original-cost basis of rate making rather than a replacement-cost or an escapable-cost basis . . .[7]

The reasonable-compensation-to-producers standard clearly is not applicable to postal ratemaking. The Postal Service is not permitted a rate of return so cost of service cannot include an allowance for rate of return. Furthermore, section 3622(b) of the Postal Reorganization Act makes the relationship between rates for specific services and the cost of rendering the particular services just as important an equation as that for total revenues and total costs. For these reasons, the "reasonable" compensation standard and any methodology based on it are not appropriate in postal ratemaking.

[R. 17,504] In discussing the reasonable rate standard for users of service, Bonbright indicates:

> But insofar as the primary function of public utility rates is deemed to be that of optimum consumer rationing rather than that of producer motivation, a different conception of a cost-price standard of rate making is suggested. Among other things, (a) enterpriser cost is not a good price determinant unless it is acceptable as a rough measure of social cost, (b) the most obviously relevant costs are incremental

---

[7] Bonbright, *supra* p. 10, n.3, at 80.

or marginal costs rather than average total costs, and (c) costs that are "sunk" in the sense that they cannot be avoided or even minimized by denying service to potential customers should be excluded from consideration if their inclusion in the rates of charge would seriously restrict demand for the service. [8]

The reasonable-rate-of-charge standard is applicable, in that one goal of postal ratemaking is optimum consumer rationing, or economic efficiency, as previously discussed. Incremental or marginal costs rather than average total costs are relevant to the extent that they can be accommodated by the practicalities of cost estimation and the need to avoid undue discrimination in the distribution of residual costs to the rate categories. "Average total costs," however, [R. 17,505] are not responsive to postal ratemaking objectives and are inappropriate for postal ratemaking.

C. The OOC's Definitions Of Attributable, Assignable And Residual Costs Conflict With The Commission's Costing Approach As Endorsed By The Courts, Lead To Fully Distributed Costs In Violation Of The Act, And Are Arbitrary And Technically Unsound

Mr. Robertson believes attributable costs to be direct costs and/or operating-type costs identified with the physical handling of mail that display the most readily identifiable causal relationships. [9] He defines reasonably assignable costs as indirect costs that may extend to overhead-type costs which Mr. Robertson believes display a less readily identifiable causal relationship. [10] He believes residual costs display the least readily identifiable causal relationship. [11]

---

[8] Bonbright, *supra* p. 10 n.3, at 80, 81.

[9] OOC-T-100 at 32, line 16 through 33, line 2; 35, line 13 through 36, line 6.

[10] OOC-T-100 at 33, lines 3-9; 36, lines 7-21.

[11] *Id.* at 33, lines 10-15.

Mr. Robertson attempts to support these definitions through references to selected portions of the *NAGCP* I and *NAGCP* III Court decisions and various costing authorities, which are taken out of context, and through the application of "functional costing," a technically hollow approach in which he classifies direct and other than direct costs as attributable, assignable, or residual depending on whether he characterizes them—[R. 17,506] without any real analysis or study whatsoever—as being "operating" or "administrative" and "most," "less," or "least" causally related to providing overall postal service. Each of these misguided approaches is examined below.

1. Mr. Robertson's Distillation Of Costing Definitions From Court Decisions And Various Costing Authorities Is Based On Language Taken Out Of Context And On Mistaken Conclusions Drawn From That Language

On pages 5, 6, 26, and 30-32 of his testimony, Mr. Robertson summarizes his incorrectly drawn costing premises. When the authorities cited by Mr. Robertson in support of these premises are examined, it is evident that, properly read, they support the following conclusions which stand in contrast to those of Mr. Robertson:

1. The application of accounting principles and cost allocation formulae does not point to distributions based on relative use.

2. Except for specific-fixed costs, attribution extends to fixed costs only if the fixity referred to is with respect to volume changes in the *short run* and the so-called "fixed" costs vary with volume in the longer run.

3. Operating costs are not the same as attributable costs. Administrative costs that vary indirectly with volume are attributable.

[R. 17,507] 4. There is a clear distinction between attributable and assignable costs.

5. Certain costs and the provision of service to various rate categories of mail are either causally related or they are not; grades of causality and gray area causality is a generally inacceptable standard for cost classification.

The specific deficiencies in premises that underlie Mr. Robertson's definitions of attributable and assignable costs are best illuminated through a discussion that demonstrates the harmony among *NAGCP* I and III, proper technical costing principles, and the Postal Service's costing methodology in this proceeding. The following discussion notes the Court's and other authorities direction with respect to the definitions of attributable and assignable costs, and relates those to the discussion of technical costing issues.

a. Attributable costs defined

The Court in *NAGCP* I began its discussion of postal costing by interpreting subsection 3622(b)(3):

> Under the subsection each service must bear the postal costs "attributable *to* [it]" and in addition must also bear that portion of all other costs "reasonably assignable *to* [it]"
>
> Giving the statute a plain reading it seems clear that the first of the subsection's dual requirements calls for something more than minimal attribution. [12]

[R. 17,508] The Court goes on to discuss specifically what is meant by more than minimal attribution. It concludes that cost variability, or more precisely cost variability with volume, is not the only method to be used to identify attributable costs. The Court interprets the statutory requirement that indirect as well as direct costs be attributed as requiring attribution of more than just volume-variable costs. In so doing, the Court appears to equate directly attributable costs with those costs that are variable with volume in the short run and indirectly

---

[12] *NAGCP* I at 585, 586 (emphasis added).

attributable costs with those costs that are attributable by some other methodology:

> Strictly speaking indirect costs may not be attributed by cost variability, at least not by short-term variability; rather, attribution of such costs as a practical matter necessitates the use to some degree of cost allocation formulae based on accounting principles. [13]

In referring to indirect costs not being attributed by cost variability, the Court apparently had in mind the costs presented by the Postal Service in Docket No. R74-1, the case which the Court was reviewing. In that docket, the Postal Service presented what it said were all the relevant costs for pricing purposes, [R. 17,509 Revised 11/14/80] *the volume-variable costs*. The Postal Service identified no costs as being longer-run variable. The Postal Service in that proceeding attributed almost no overhead costs. It was in that context that the Court naturally referred to the costs attributed by the Postal Service as "volume variable" costs and to the need to use cost allocation formulae for the distribution of certain "non volume variable" costs.

The Court indicates the kind of "accounting" formulae that might be used in its reference to page 78 of I A. Kahn, *supra* p. 8. That page contains a discussion of the distinction between joint and common costs, and the allocation of ". . . common overhead costs in proportion to the variable costs that can be directly attributed to the individual products." [14] For example:

> Less tenuous would be the practice of distributing the expenses of a personnel department among operating divisions upon the basis of the relative number of employees . . . [15]

---

[13] *NAGCP* I at 586.

[14] I A. Kahn, *supra* p. 11, at 78, n.36.

[15] *Id.*

Indirect attributable costs, then, appear to include costs that reasonably can be allocated proportionately according to the distribution of variable costs. The Court then presents material to support [R. 17,510 Revised 11/14/80] this interpretation and further clarifies the definition of both direct and indirect attributable costs:

> . . . Congress intended attribution under subsection 3622(b)(3) to extend beyond minimally attributable costs and to include to a significant extent those additional costs which, although not measurable variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service.[16]

Direct attributable costs, therefore, are those costs measurably variable with volume. Longer-run variable costs cannot be direct costs, because they are not in any direct way measurably variable with volume. Since longer-run variable costs represent costs that tend to respond to volume changes well after the volumes have changed, there is no feasible way to measure directly the relation of volume changes to changes in cost. Likewise, indirect short-run variable costs are not measurably variable, but may be attributed through the use of cost allocation formulae based on accounting principles. The Court recognizes that indirect costs may include longer-run variable costs: "Strictly speaking, indirect costs may not be attributed by cost variability, *at least not by short-term variability.*"[17]

[R. 17,511 Revised 11/14/80] It appears that indirect costs either vary with volume over the longer run or can reasonably be allocated in proportion to the distribution of measurably variable costs.

---

[16] *NAGCP* I at 586.

[17] *Id.* (emphasis added).

b. Reasonably assignable costs defined

Having interpreted the statutory requirements for direct and indirect attribution, the Court turns to the portion of subsection 3622(b)(3) concerning "reasonably assignable" costs:

> That is, after the process of extended attribution is complete, a portion of remaining costs are to be assigned to the various mail classes and postal services to the extent that it can reasonably be determined or estimated that certain classes of service may account for particular costs. [18]

In discussing the legislative history of reasonably assignable costs, the Court states:

> Under [the Senate] provision, each mail class or postal service, in addition to bearing "operating costs"—which one might reasonably equate with attributable costs—would also have been required to bear some portion of "overhead" and "other institutional costs of the Postal Service" at least to the extent that a cause and effect

[18] *NAGCP* I at 586.

Testimony of USPS Witness Heselton (Cross)

[R. 17,638] THE WITNESS: Yes, I see that now. And what was your question, Mr. Kendall?

BY MR. KENDALL:

Q. Do you recall that the Court said what I read?

A. Well, I have that language before me now, and the court did allude to what they characterized as the PRC's current position.

The thrust of my testimony is when you take a look at what the PRC really did, they went into extended variability.

Q. In the event the extent to which one should seek to extend attribution beyond volume variability was not challenged in the Court, and the Court, while it expressed some dicta, that what the Commission did in that case may well have been an appropriate application," that was not a contested point in that appeal, am I correct?

MS. BECK: May I have that question reread, Mr. Vice Chairman?

VICE CHAIRMAN BRIGHT: Mr. Reporter.

(Question read)

THE WITNESS: No, it was contested before the Commission, but not before the Court.

BY MR. KENDALL:

Q. Now, Mr. Heselton, I think I read your testimony correctly. Let me see if I can establish some basic [R. 17,639] principles.

It is your position that there are costs which are directly attributable to the classes of mail on the basis of variability analysis, Point No. 1?

A. That is correct.

Q. And in addition, there are indirect costs which are attributable on the basis of short-run variability analysis, and some costs which are attributable to indirect costs attributable on the basis of long-run variability analysis?

MS. BECK: May I have that one reread, please?

VICE CHAIRMAN BRIGHT: Mr. Reporter.

(Question read)

BY MR. KENDALL:

Q. Should I repeat that Mr. Heselton, it might have been garbled?

A. Well, longer-run costs would be indirectly attributable, yes.

Q. As also short-run indirect variable costs?

A. That is correct.

Q. And in addition, as you state on page 23, there are still other indirect costs which can reasonably be allocated in proportion to the distribution of measurable invariable costs, costs which themselves are not variable?

A. Yes, that is the extended attribution.

[R. 17,640] An example would be, say, the cost of the man who cleans the floor space occupied by a supervisor or a mail supervision employee who is handling the mail. We would attribute the cost of that.

Q. And after those processes are completed, then one would move on to the next phrase of costing and then to pricing under the way you interpret the Act?

A. After the process of extended attribution was completed, yes.

Q. On page 16 of your testimony, you say at lines 13 and 14 that "One goal of Postal Service rate making is optimum consumer rationing, or economic efficiency."

Is that in your view a primary or a subsidiary goal?

A. That raises the question, Mr. Kendall, primary or subsidiary to what?

Q. To any other goal, postal rate making.

Is that the primary goal, or is there some other goal which is more primary, or takes precendent over optimum consumer rationing?

A. Well, I think that is a goal that stands at the same level, perhaps as some other goal. The whole point of the Postal Reorganization Act was to put the Postal Service in a business operation-like way, and I think that is one of the characteristics of the business-like

* * * *

[R. 17,646] variability with volume—and here by cost variability with volume I am indicating the kind of variable cost that the Commission was dealing with in the last docket, Docket No. R77-1—

Q. Excuse me, can you point to the line on page 25 to which you are now referring?

A. Well, I am referring to line one "The variability remained to key attributes" and the Commission had before it as variable costs a set of costs which were short run variable, longer run variable, which included the kind of extended attribution I referred to just a few minutes ago when I indicated the attribution of the cost of the floor occupied by supervisor who was supervising a postal employee who was handling classes of mail in an activity that was variable with volume. And that, to me, is the line, there is a tie of some kind; it is ultimately back through volume variable base.

I think a reasonable/assignable cost to the extent they exist is something different than that.

Q. And I believe that we also agreed that there were some costs which were atttributable, which did not tie back to a volume variable base.

A. Well, I don't think we agreed to that at all, at least I don't recall agreeing to that. Here I think the key is what one

means by tying back to that. And the [R. 17,647] particular cost attribution I told you about, the floor space occupied by a supervisor, one can say at some point that does get back in terms of an allocation basis to somebody who is handling mail and whose time is variable with voiume, but there is a lot of assumptions that—or findings, not just assumptions, but it is a case of examining the structure that gets one back to that point, and it is not volume variable analysis.

Q. Are there any fixed costs which are attributable in your scheme?

A. Yes.

Q. And those don't tie back to a volume variable base, do they?

A. In that particular case, and my testimony as a matter of fact has not addressed the issue of specific fixed cost, but as a practical matter those costs were attributable even though they don't tie back to that, I think properly on the ground of extended attribution, yes, in the sense that they involve of one and only one category of mail.

But an argument could be made for reasonably assigning those costs?

Q. Tell me, is it possible to have a specific fixed cost that relates to more than one class of mail?

A. No, it is not.

* * * *

[R. 17,724] if the witness is looking at the revised page, because on the revised page that sentence appears at lines three to five. The sentence which Mr. Sharfman read.

THE WITNESS: That is correct, let me in order that the record is properly reflective of what I am looking at here, it would be lines one through five on page 35 as revised.

BY MR. SHARFMAN:

Q. I thank your Counsel for assistance there. I of course did not get these revised pages until this morning and there-

fore occasionally may misstate you, so please correct me if that will make the record more clear.

Now, if I may ask you for your definition of "average variable costs"?

A. What I am referring to there is determination is made that through studies and otherwise that a particular group of costs are variable with volume either directly or indirectly, longer run and otherwise, and those costs divided by the number of units of service, of the service involved yield you an average variable cost.

Q. I am sorry that I don't take shorthand. Let me make sure I understand what your answer was.

The two parts are groups of costs which have been determined to be variable with volume either in the longer run or otherwise—that is one-half of your equation?

[R. 17,725] MS. BECK: I think the witness said "directly or indirectly."

THE WITNESS: That is correct.

BY MR. SHARFMAN:

Q. Groups of costs which are either directly or indirectly variable with volume, either in the longer run or otherwise?

A. That is correct. I had in mind that longer run would apply to directly as well as the various extended attributions through piggybacking, through which the Postal Service attributes costs.

Q. And the other half of that equation is units of service?

A. In effect divided through by the volume of mail we do come up with a unit cost.

Q. Unit of service is frequently pieces, but it might be something like cubic foot miles, is that correct?

A. Well, in the end the average variable costs come down to average variable costs per piece. That is what we are looking at for purposes of rate setting.

Q. So then the units of service can be considered pieces of mail?

A. Well, units of service can be considered pieces? I am having some trouble with that. When we developed the costs which are variable with volume and we divided

* * * *

[R. 17,734] Seven percent of what? and 16 percent of what? I don't know whether there would be a problem or not without some additional information.

Q. I am trying to determine the extent to which you think variation must be proportional. We are talking about a group of costs.

Now, for purposes of your understanding let's assume that the costs are within one cost segment. If over time there is large variation in the reaction of costs in a cost segment to changes in volume would that indicate to you that there was no variability there?

A. As I think I said before, if there is a response in costs to changes in volume and that response is not proportional we would still be looking at that in determining attributable costs. Proportionality is simply not a test here. The only reason that Postal Service costs vary proportionally for certain subcomponents is because the Postal Service after going out into the field and seeing how operations work has set up a structure, has isolated those particular activities which seem to vary directly with volume or proportionally with volume from the others. And if we have a situation where we don't have proportionate variability we will try to develop some method of breaking it down to the point that we do so that we can simplify the attribution process in terms of just [R. 17,735] developing the numbers. But the initial analysis doesn't assume proportional variability of costs with volumes at all.

Q. Is there any particular size in the variation of the units of service that you look for in measuring variability or does that depend on the particular study that you are doing?

A. I don't think there is any particular size of variation that we look for. I don't think that is a constraint. An example would be in casing of mail. The variability there is variable regardless of amount of volume. It is not variability which assumes a particular volume change for the most part.

Q. There are instances, are there not, where you don't go out into the field to measure variability but rather you employ logical analysis to determine whether it is reasonable to assume that costs will vary with volume?

A. I would say particularly in the areas of extended attributions. I referred this morning to the cost of the floor space occupied by the supervisor of an employee handling mail, and whose time depends on the amount to be handled. That that is a situation which is obviously not subject to measurement and in that sense we don't go out in the field and measure it. However, we do have studies or information or data at our disposal which will indicate

Testimony of USPS Witness Martin (Direct)

[R. 21270] If economies of scale are introduced, the cost of utilized capacity will be less than 100 percent variable with volume. Because no information is available on economies of scale in postal purchased transportation, this analysis assumes none. Hence, the variability of utilized capacity costs is conservatively overstated.

Since utilized capacity costs vary directly with mail volumes, they are fully attributable to the classes and subclasses of mail utilizing that capacity. As we have seen, under current procurement methods, latent capacity costs are caused by an irregular distribution of volumes over time and place. With respect to mail volumes, latent capacity costs do not vary in any predictable manner with volume and therefore, are not attributable. As described in witness Alenier's testimony, we have classified costs which are determined to be not attributable as either institutional or reasonably assignable.

The method I have employed to identify reasonably assignable costs in purchased transportation is to pose the question: "If preferential treatment were eliminated, would non-attributable costs be reduced or eliminated?" A category of [R. 21271] mail receives preferential transportation treatment when it routinely uses the non-local transportation services essential to achieve service standards equivalent to that of first-class mails. Therefore, categories of mail using air, inter-SCF highway and rail passenger train services receive preferential treatment in transportation, because these are the transportation services essential to achieve first-class mail service standards.

If service standards for all categories of mail were reduced to that of ordinary second- and third-class—*i.e.*, if preferential treatment were eliminated—air, inter-SCF highway [1] and rail

[1] Some highway routes (or portions thereof) designated as inter-SCF would have to be retained to assure a complete network of transportation services to all facilities.

passenger services would no longer be essential and their costs could be avoided. Since these services have latent capacity costs which could be avoided by dropping preferential treatment, such costs are preferred treatment costs, and reasonably assignable to the categories of mail whose current service standards mandate their use.

Absent any preferential treatment, the resulting postal transportation requirement would be essentially the bulk mail transportation network. The latent capacity costs of the bulk

Testimony of USPS Witness Merewitz (Direct)

[R. 21934] B. Refinements To The Cost Segments And Components

Observations from the In-Office Cost System (IOCS) are misleading if used for identifying or distributing peak-load costs without further analysis. They rely almost entirely on a concept of average variable costs whereas what is needed for identifying and distributing peak-load costs is something more approximating the concept of marginal costs. The IOCS cannot discern whether labor used on a piece is used because it is (a) necessary and timely or (b) used for workload leveling. My opinion is that crews are set up on tours 1 and 3 mainly to process preferential mail. While inventories of third-class mail and second-class non-red-tag may be worked, the preferential classes are largely responsible for causing the costs of these teams of mail processing personnel ready to serve the peaks. My exercise of the MPCM provides a superior approach for identifying and distributing peak-load costs.

C. Parametric Runs Of The Mail Processing Cost Model

The MPCM was worked in a parametric fashion to determine how costs will be affected if mail arrives throughout the week, *i.e.*, the mail volume is the same on each day. This condition simulates the removal of peaking. It is also assumed that mail is available early enough in the day so that the hourly peak-load effects are

* * * *

[R. 21947] of the weekly MPCM is the report "Mail Processing Costs by Workcenter," Report No. 26. This report is presented as a Library Reference C-16. A description of the content of Report No. 26. This report is presented as a Library Reference C-16. A description of the content of Report No. 26 is contained in Exhibit USPS-9K.

D. Results Of The Simulations

The exercise of the model shows that mail processing costs could be reduced by 17.06 percent if peaking were eliminated. See Exhibit USPS-9D.

From Report 26 we can observe that the cost savings in percentage terms are always larger than the manpower reduction because hours are saved on the more costly days and during the more costly period when the night differential is in force from 6:00 p.m. through 6:00 a.m.

The main result of the analysis is that 17.06 percent of the subset of mail processing costs considered can be saved if the conditions of the experiment are met: people mail early in the day, mail comes to the SCFs in the same weekly quantities but evenly distributed over five days. It is not important that these conditions will not be met in practice. The purpose of the simulation experiment is to learn the price we pay for people's currently less-constrained habits. In fiscal 1978 $3.911 billion of Segment 3 costs were Mail Processing Costs. Some $2.548 billion was accounted for

[R. 18131] recent report on truck costing Mr. Berliner's own firm, Peat, Marwick, Mitchell & Co., has stated that:

> Allocation of costs must be arbitrary when there is no direct causal relationship . . . [E]ach [allocation method] biases individual shipment costs toward a particular type of traffic. [2]

In the past, the unused capacity costs of inter-SCF and inter-BMC contract highway service, for example, have been allocated on the basis of non-local cubic foot miles. Equally correct allocations could be done using volume, weight, ton-miles, revenue, a combination of weight and volume, total transportation cost, total service cost, etc. Not only are all of these allocations schemes equally correct, they are also all equally inappropriate for rate setting, as I shall explain next.

D. Fully Distributed Cost Is Not The Proper Basis For Pricing And Rate-Setting

Rates based on fully distributed costs, which include the allocation of institutional costs, are arbitrary, uneconomic rates. Such rates would serve the interest of neither the Postal Service nor the public.

[R. 18132] Rates based on fully distributed costs are arbitrary because cost distribution is itself arbitrary. This is because there is no cause-and-effect relationship to govern the allocation of institutional costs. If we ask ten different people to allocate unused capacity costs among classes of mail, each might invent a different allocation scheme and get different results, all equally correct from the standpoint of economic theory. Therefore we should never fool ourselves into thinking we have found *the* fully distributed cost of transporting a class of mail. There are several fully distributed costs of transporting a class of mail, and the choice of which to use for rate setting is inherently arbitrary.

Using fully distributed costs for rate setting is uneconomic for two reasons. First, it fails to reflect the impact of rates on

demand. Second, it does not, except by rare coincidence, minimize the Postal Service's deficit or maximize the public welfare.

The economic literature contains many expositions decrying rate-setting based on fully distributed costs. One of the most lucid is a paper on railroad costing and pricing written by ten economists, mostly university professors, at the request of the Association of American Railroads. (The authors use the term "unallocable costs" to refer to what [R. 18133] the Postal Service calls institutional costs). The economists agreed that:

> "Fully distributed" cost, measured by some kind of arbitrary statistical apportionment of the unallocable costs among the various units or classes of traffic, is an economically invalid criterion for setting minimum rates, from both a managerial and a regulatory standpoint. No particular category of traffic can be held economically responsible for any given share of the unallocable costs. Whether any particular rate is above or below some fully distributed cost is without real economic significance for minimum pricing . . .
>
> Thus, the fully distributed cost doctrine does not reflect valid principles of pricing, where fixed costs are significant. Application of this false criterion in the railroad's present competitive environment would bring about prices which (for much traffic) would shrink volume. If the same total constant costs were then distributed on the shrunken traffic volume, even greater fully distributed unit costs would result, and if this should cause the railroads to raise rates still higher relative to the prices of other modes of transport, then rail traffic volume would be still further reduced. A costing procedure which can inaugurate such a destructive cost-price spiral is not qualified to serve as a basis for pricing in the railroad business or in any other with unused capacity. [3]

This theory is helpful in deciding how to handle the cost of unused capacity in purchased transportation. Specifically, it explains why we must be careful to keep the cost of unused capacity, which is inherently not attributable, out of our estimate of the variable cost attributed to each class of mail.

Testimony Of USPS Witness Steger (Rebuttal)

[R. 17,347]

1. Q. PLEASE STATE YOUR NAME AND ADDRESS.

   A. My name is Wilbur A. Steger. I am Chairman of the Board and President of CONSAD Research Corporation, 121 North Highland Avenue, Pittsburgh, Pennsylvania 15206.

2. Q. WHAT IS YOUR RELEVANT PROFESSIONAL EXPERIENCE?

   A. I presently manage, and participate in the conduct of, the economics research performed by CONSAD Research Corporation and have done this since 1963. I believe that, literally, dozens of applications of economic principles in which I have participated are relevant to the application of these principles within the context of my testimony before the Postal Rate Commission concerning Postal Rate and Fee Increases, 1980, Docket No. R80-1. Economics is an evolving, dynamic social science: each of my applications of this discipline, and my assessment of its strengths and weaknesses, has helped me prepare for this testimony before the Commission.

   I received my B.S. degree in Economics from Yale University in 1950 and my Masters and Ph.D. in Economics from Harvard University in 1952 and 1955, respectively. My areas of specialization were microeconomics and public finance. I studied under many microeconomists with worldwide reputation including Drs. Frank Knight, Henry Simons, Warren Nutter, Gottfried Haberler, Edward H. Chamberlain, and John F. Due.

   I have had teaching experience. I was a teaching fellow at Harvard from 1952 through 1955 and Adjunct Professor, [R. 17,348] University of Pitts-

burgh, 1963-1973. I have taught special courses and seminars in economic analysis and public finance at Carnegie-Mellon University, SUNY-Binghamton, and other universities, and continue to undertake such assignments on an *ad hoc* basis.

My career as an economic analyst and researcher began at the RAND Corporation, Santa Monica, California, where I was a senior economic analyst from 1955 to 1962, and Deputy Manager and Acting Manager of RAND's Logistics Systems Laboratory between 1960 and 1962.

I founded CONSAD Research Corporation in 1963 and have been its Chairman of the Board and President since that time. In that capacity I have participated in and have managed more than 300 research projects in connection with matters of public policy and finance for the U.S. Treasury Department, and these other Federal agencies: Department of Commerce; Department of Labor; Department of Transportation; Environmental Protection Agency; Department of Energy; Department of Health, Education and Welfare; Nuclear Regulatory Commission; Department of Housing and Urban Development; Department of Defense; National Science Foundation; Interstate Commerce Commission; and other public agencies. In addition, I have consulted for several state and city agencies, as well as a number of private corporations.

I have been an expert witness on many occasions, on [R. 17,349] economic analysis issues, most recently (May-September 1980) being a government witness for the United States Railway Administration in connection with the valuation proceedings of the Penn-Central Railroad. I have also been an expert witness on transportation costing matters for the U.S. Department of Justice before the U.S. Court of

Claims, 1976: railroad evaluation for Burlington Northern versus the United States; and the Interstate Commerce Commission representing the Commonwealth of Pennsylvania, 1964: effects of proposed merger, Pennsylvania and New York Central Railroads.

I am a member of these associations:

—American Economic Association

—National Tax Association

—Institute of Management Science

—Operations Research Society of America

—Urban and Regional Information Systems Association

—Academy of Management

—Econometric Society

—Phi Beta Kappa.

In my work on cost, financial, and pricing aspects of transportation and commercialization systems, I have been a specialist in these microeconomic and finance matters:

—Pricing of natural monopolies;

—Pricing and costs under conditions of imperfect competition;

[R.17,350]

—Incorporation of external economies and diseconomies in production function theory;

—Price discrimination (and degree of discrimination) under conditions of varying industry structure;

—Rule for government intervention;

—Pricing and allocation of costs under conditions of peaking, system congestion, and excess capacity;

—Public enterprise costing: deregulation and uncertainty; and

—Price behavior and business policy.

I have published more than one hundred articles and monographs, several dozen in professional refereed journals, and others as RAND, CONSAD, and government reports. My complete vita is attached.

[R. 17,367]

7. Q. IS IT POSSIBLE, AS ASSERTED BY DR. CICCHETTI AND SEVERAL OTHER WITNESSES, TO MEANINGFULLY ATTRIBUTE ALL COSTS IN A MULTIPRODUCT/MULTISERVICE ENTERPRISE TO INDIVIDUAL PRODUCTS AND SERVICES?

A. A common theme running through the testimony of several witnesses representing various intervenors, including Dr. Cicchetti, Dr. Moshman, Dr. Tye, Mr. Kloss, and Mr. Berliner, has been that virtually all costs of a multiproduct/multiservice enterprise can be, and generally are, accurately traced to individual products and services provided by that enterprise and, thus, may be meaningfully attributed to these products and services on the basis of cost causality. Additionally, it has been inferred that it is the cost attributed to a product or service which is the prime determinant of the price ultimately set or charged for that product or service.

It is my belief that these contentions are not completely true and accurate with respect to established accounting theory and practices.

The field of accounting that is most intimately concerned with the detailed issues involved in cost attribution or allocation is, not surprisingly, cost accounting. The field of cost accounting is broadly viewed as the process of determining the costs of an enterprise for the purposes of management. However, because of the many varied areas of endeavor encompassed by this field (*i.e.*, budgeting, cost control, cost [R. 17,368] analysis, inventory valuation, etc.), there is little agreement among practitioners as to the most appropriate definition of the fundamental purpose(s) of cost accounting. Although no single precise definition of cost accounting currently exists, a group of accounting experts, sanctioned by the Organization for European Economic Co-operation, visited a number of U.S. companies to observe their cost accounting practices. In their report, these experts presented the following general conclusion:

> The primary purpose of cost accounting in America appears to be to assist management to control costs, and to create or intensify an awareness of the importance of cost to the well-being of the company—or in the other words to stimmulate "cost-consciousness." The ascertainment of product unit cost, although by no means disregarded, is of secondary importance.[1]

This empirically based assessment of cost accounting's role in U.S. industry helps me develop these observations:

—Cost accounting functions primarily as a management aid: thus, the general types of cost informa-

---

[1] Organization for European Co-operation, *Cost Accounting and Productivity: The Use and Practice of Cost Accounting in the U.S.A.* (Paris, France: 1952).

tion collected and the various procedures employed in the collection, analysis and presentation of this information are heavily dependent upon management requirements and objectives; and

—The determination of specific product unit cost, since this is a secondary consideration to management information for cost control, will normally [R. 17,369] also be highly influenced by the management requirements and objectives particular to an organization.

In the analysis of cost information, both for the purpose of cost control and determination of product unit costs, the accurate attribution of incurred costs to various cost centers (*i.e.*, time periods, divisions, departments, products, etc.) is an extremely difficult and important process. Even though, in practice, there are few truly uniform procedures which are followed in cost accounting and the actual procedures employed are influenced by management, cost accountants must always strive to accurately attribute and allocate costs to the centers which are, in reality, directly responsible for those costs. This is essential, since the development of an inaccurate cost picture would be misleading to management and could very likely cause decisions to be made that would be detrimental to the organization.

Two types of costs which accountants generally consider *not* to be allocable in a meaningful fashion (*i.e.*, on the basis of cost causality) are:

—*Joint Costs*—the costs of simultaneously producing or acquiring two or more products that must, by their nature or the nature of the process be produced or acquired together; and

—*Common Costs*—the costs of materials, facilities or services that are incurred for the benefit of several departments and/or products as a group.

Economic theory distinguishes between these two types of costs [R. 17,370] in that joint product costs are deemed to be theoretically inseparable and thus not attributable, in any specific proportions, to individual joint products; while common costs are, in theory, separable costs and therefore may be attributed to specific products departments. In practice, though, cost accountants consider joint and common costs to be almost equally inseparable and unattributable, on the basis of cost causality, to individual products. In fact, accountants tend to use the terms joint and common cost synonymously. For example, the National Association of Accountants (NAA) makes no practical distinction between joint and common costs in its definition of joint costs, which reads:

> Costs are joint when two or more distinguishably different products are produced together from a single input cost factor. The characteristic condition of a joint cost is that the cost of several different products is incurred as a lump sum for the combination and not separately for the individual products. [2]

Because U.S. industry is characterized by multiproduct production and the widespread use of common input factors in the production of many products, the above statement points out the fact that, for practical accounting purposes, joint type costs are far more prevalent and thus a more significant problem than classic economic theory would lead one to believe.

[R. 17,371] Joint and/or common costs, since they are not directly attributable to specific products, must be allocated to various cost centers on some

---

[2] National Association of Accountants, *Costing Joint Products*, Research Series No. 31 (New York: 1957), p. 8.

subjective and judgmental basis, rather than on well defined costs cause and effect relationships, if management desires to estimate the fully distributed cost of products. The general nature of costs which require subjective allocation is provided in the *Accountants' Cost Handbook* as follows:

> (1) those recurring fixed costs that are incurred regardless of the level of product output, (2) those costs generally identified with periods rather than products, and (3) those costs of production that vary with product output but cannot be traced directly to individual products. [3]

The fact that no uniform basis of methods of allocating joint or common costs currently exist, and the problems this creates in the accurate determination of fully distributed product costs, are pointed out in the previously cited NAA report, which states:

> To some extent all methods of allocating joint costs to individual co-products rest upon opinion rather than upon objective measurements. In the words of one company representative, "It is possible to determine a cost, but there is no way to determine the cost of a co-product." Where the method for determining product costs is thus subjectively determined, equally competent accountants may arrive at quite different costs for the same product, and there is no way to prove that one cost is more correct than another. Evidence [R. 17,372] of this was seen in the field study where different companies making the same products by the same processes often reported different bases for cost allocation. Moreover, in virtually every company difference of opinion arise with regard to how to allocate costs. [4]

---

[3] Robert I. Dickey, ed., *Accountants' Cost Handbook*, Second Edition, (New York: Ronald Press Company, 1960), p. 13.1.

[4] National Association of Accountants, *op. cit.*, p. 28.

Nevertheless, this same report does list the two major bases normally used for allocating common costs to products, which are the following:

—Bases which are assumed to reflect the amounts of benefit received from common cost factor; and

—Bases reflecting the ability of individual products to absorb these costs. [5]

The fact that these bases are quite general and may lead to inaccurate estimates of true product costs is quite clear. In point of fact, the second allocation basis has little, if any, relationship to the actual incurring of costs, but rather, is more closely tied to the market for those products and their relative elasticities of the demand.

Given the varied and subjective nature of the allocation of joint and common costs to products, the role of product cost in the determination of specific product prices, in cases where substantial joint or common costs exist, is tenuous at best. The National Association of Accountants recognizes this fact by stating that:

> [R. 17,373] Companies in industries characterized by joint production with an inflexible output mix often stated that costs computed for individual products have little or no influence on pricing decisions. It is necessary to dispose of the output of all products and prices of individual products are accordingly adjusted to sell the products in the proportion in which they are produced. [6]

---

[5] *Ibid.*, p. 4.

[6] *Ibid.*, p. 46.

and subsequently go on to say:

> While costs determined for individual products may be useful guides to pricing in some situations, it seems essential that in making pricing decisions management should always consider the whole picture presented by a group of joint products.[7]

Finally, the use of product cost as an aid to, rather than the primary determinant in, product pricing decisions is not unique to industries and products with high degrees of joint and common costs. This fact is brought out by James H. Rossell and William W. Frasure, who state:

> . . . cost accounting aids management by furnishing estimated costs to make and sell a given volume of product, and also, the estimated profits which may be obtained at different prices. But, if a flexible volume of goods can be produced and sold, the estimated maximum profit is a questionable approximation since techniques for forecasting the volume of goods that can be sold at different prices are inadequate. Regardless of the stability or flexibility of the volume to be produced and sold, the selection of the ideal price should not be based solely on the calculations of anticipated costs; it should evolve from the information contributed by the statistician, [R. 17,374] economist, market analyst, cost accountant, and other specialists. Nevertheless, cost computations are an essential aid to the judgment exercised in price determination . . . But it does not completely answer the question of the unknown price, because it cannot ascertain a market price; an adequate understanding of this unknown factor requires a thorough knowledge of competition and customer demand.[8]

---

[7] *Ibid.*, p. 49.

[8] James H. Rossell and William W. Frasure, *Managerial Accounting, Second Edition* (Columbus, Ohio: Charles E. Merrill Publishing Company, 1972), p. 487.

[R. 17,375]

8. Q. IS DR. CICCHETTI CORRECT WHEN HE DECLARES THAT COST ALLOCATION ALONE IS A SUFFICIENT TECHNIQUE FOR POSTAL RATE AND FEE SETTING?

A. In the context of a natural monopoly producing multiple products, attribution of all marginal costs generally will not result in the allocation of total costs. Although *marginal* and *incremental* costs can be attributed to individual products, a cost allocation problem remains. A process must be established for allocating the residual unattributable costs. Even Dr. Cicchetti acknowledges this problem, at Tr. 28/9383, 9481, 9529.

Denying the pertinence of demand conditions, Dr. Cicchetti and numerous other witnesses, including Dr. Moshman, Dr. Tye, Mr. Kloss, and Mr. Berliner, have asserted, or at least strongly—but incorrectly—implied that:

—All Postal Service costs can be allocated to individual categories of mail using accounting allocation rules reflecting presumed physical/engineering relationships.

—Based on these cost allocations—and without any consideration of the demand conditions affecting the various categories of mail—prices can be established for the different categories of mail that will fulfill the legislated revenue requirements.

However, a modest expansion of their conceptual analysis strongly suggests the general inaccuracy of this implicit or explicit assertion.

[R. 17,376] The approach to Postal Service pricing propounded by these witnesses can, with slight simplification, be summarized in terms of a six-step procedure:

—Distribute to each mail category all costs directly or indirectly attributable to the provision of that category of mail service on the basis of unambiguous physical relationships.

—Apportion the remaining joint or common costs to one or more classifications of institutional cost corresponding to the groups of mail categories that, in combination, cause the costs to be incurred.

—Allocate the costs in each institutional cost classification among the categories of mail associated with the classification using some accounting allocation rule. Typically, the proposed rule will embrace some presumption about the physical or engineering relationships underlying the generation of these costs. Thus, the allocation might be based on the relative number of pieces, weights, or cubic volumes of mail projected to be processed in each mail category. [9]

---

[9] Dr. Cicchetti proposes two fundamentally different approaches to allocating institutional costs to individual mail categories. Thus (at Tr. 28/9474, 9500, 9529-30, 9533, 9534, 9544, 9656-60), he suggests the development of estimates of fully allocated, or fully distributed, costs by apportioning *all* institutional costs among mail categories on the basis of relative numbers of pieces, weights, cubic volumes, or time utilizations. Conversely (at Tr. 28/9449, 9531, 9533, 9568-75), Dr. Cicchetti urges applying such accounting allocation rules only to a portion of the institutional costs, and then employing levelized, or equalized, markups of the sum of attributed and allocated costs to distribute the remainder of the institutional costs among mail categories. However, he provides no substantive guidance for determin-

—[R. 17,377] Sum the costs attributed *or* allocated to each category of mail to derive an estimate of the fully distributed cost of providing that category of postal service.

—Estimate the volume of mail to be processed in each mail category during the test year. Since the estimated price of postal service has not been determined for any mail category at this juncture, these volume estimates cannot be derived through the use of standard economic demand relationships describing the interdependence between price and quantity. Rather, the estimates must be developed on some other basis which, at least implicitly, presumes the price elasticity of demand for mail service to be zero.

—Calculate the price, or rate, for each category of mail by dividing the fully distributed cost for that class of mail be its estimated volume.

For the postal rates established through this procedure to fulfill the legislated revenue requirements, the volumes of service demanded by postal customers in each mail category at these rates must correspond exactly to the estimated volumes used in calculating the rates, or fortuitous offsetting effects must occur. Because no explicit consideration has been taken of demand relationships in estimating volumes or establishing prices, the likelihood that such correspondence will prevail in practice is

---

ing the portion of the unattributable costs that should be distributed using accounting allocation rules. Dr. Moshman's testimony apportions to the individual mail categories the average of the cost allocations produced on the basis of the relative number of pieces, and the relative weights, of mail in the various categories.

small. [10] In [R. 17,378] any event, it would be inappropriate merely to assume that this correspondence would exist, since established economic theory, existing empirical demand elasticity estimates, and persistent Postal Service deficits all provide compelling evidence to the contrary.

Therefore, it is important to determine at this stage of the rate-setting process whether the rates calculated using the six-step procedure outlined above can reasonably be expected to, in fact, generate the estimated volumes of mail used in determining the proposed rates—or, less restrictively, whether the rates can reasonably be expected to produce mail volumes in the various categories that, in total, provide the required aggregate level of revenue. To perform such a determination, the proposed rate for each mail category must be entered into an estimator of the demand function for each category to derive an estimate of the quantity of postal services expected to be demanded in each mail category under the proposed rate structure. At a minimum, this would involve use of the prevailing postal rate in each mail category, the current volume of mail in each category, the proposed change in postal rates in each category, and the estimated price elasticity of demand for each category to derive an estimate of the change in volume expected for each category. *Only* if the estimated quantity of mail

---

[10] Unless, of course, the implicit assumption that demand for all mail classes is perfectly inelastic is true, in which case *any* full distribution of total costs will produce prices that fulfill the legislated revenue requirements. Yet, if Dr. Cicchetti and his clients believed this to be the actual situation, it is difficult to understand why they would expend any resources protesting any proposed postal rates, since all postal rate increases would be absorbed by greeting card purchasers without any adverse effects on greeting card sales.

for each category were identical to the quantity [R. 17,379] used in calculating the proposed rate for the category (or if, fortuitously, the sum of the products of the proposed postal rates and estimated volumes for all categories were identically equal to the required aggregate level of revenue) would the proposed rate structure fulfill the legislated revenue requirement of the postal service. Existing empirical evidence indicating non-zero estimated demand elasticities, and pervasive historical experience with persistent Postal Service deficits, provide strong indications that this situation generally would *not* be observed. Rather, this evidence indicates that, in general, the six-step rate-setting procedure outlined above would be critically deficient in establishing rates that fulfill the legislated revenue requirements of the postal service, *precisely because it fails to take explicit account of the demand conditions affecting the various categories of mail.*

To remedy this critical deficiency, it is necessary, at a minimum, to augm[illegible] the six-step procedure with an additional mechanism to assure fu[illegible]ment of the revenue requirement. In particular, a mechanism must be established that will appropriately adjust the proposed postal rates in a manner such that:

—Postal revenues will increase whenever the estimated volumes associated with the proposed rate structure provide in sufficient revenue to fulfill the legislated requirement.

—[R. 17,380] Postal revenue will decrease whenever the estimated volumes generate revenues in excess of the legislated requirement.

Standard microeconomic principles provide the conceptual basis for precisely such an adjustment mechanism. Specifically, economic theory clearly

demonstrates that revenues can be increased by raising the prices of goods whose demands are inelastic or reducing the prices of goods whose demands are elastic. Conversely, revenues can be decreased by reducing the prices of goods whose demands are inelastic or increasing the prices of goods whose demands are elastic.

Even Dr. Cicchetti, at Tr. 28/9426-27, 9482, acknowledges the logic of this adjustment mechanism. In fact, he expands upon the consequences of using this mechanism by observing, at Tr. 28/9644, that the rate adjustments developed using the mechanism will induce changes in postal volumes and, hence, changes in Postal Service costs. However, he fails to appreciate the full implications of these consequences. In particular, for mail categories with inelastic demands, the adjustment mechanism will increase rates, which will induce reductions in postal volumes and costs, and hence will unambiguously reduce the revenue deficit. Conversely, where demand is elastic, postal rates will be decreased, inducing increases in mail volumes and Postal Service costs that counteract the intended increase in revenue and produce an indeterminate effect on the revenue [R. 17,381] deficit. Thus, contrary to Dr. Cicchetti's avowed preference for reducing postal rates expressed, for example, at Tr. 28/9381, 9628, 9737, the cost and revenue implications of the adjustment mechanism leads to the clear conclusion that increasing postal rates for mail categories with inelastic demands will commonly be more effective than reducing rates for categories with elastic demands as a technique for fulfilling the legislative revenue requirements of the Postal Service. In any event, by appropriately applying rate adjustment principles based on price elasticity and demand—in conjunction with corresponding adjustments of cost esti-

mates, as feasible—the proposed postal rate structure can be modified to produce a set of prices and associated volumes of service for the various mail categories that generate required aggregate levels of revenue.

Thus, contrary to the assertions of Dr. Cicchetti and many of the other witnesses opposing the proposed postal rate structure, it is clearly *not* true that postal rate structures fulfilling the established legislative guidelines can be established without any consideration of the demand conditions affecting the different categories of mail. Rather, fulfillment of the legislated revenue requirements is critically dependent upon direct incorporation of such considerations within the rate-setting process.

Yet, persistent Postal Service deficits also highlight [R. 17,382] an empirical fact strongly emphasized by Dr. Cicchetti. Specifically, at Tr. 28/9405-06, Dr. Cicchetti stresses the high variability, and consequent unreliability, of existing estimates of the price elasticity of demand for the various categories of postal services. He then proposes two alternative approaches to dealing with this variability.

At Tr. 28/9441-42, 9689, 9695, 9698, 9733-35, Dr. Cicchett recommends analysis of the interdependence between postal rates and volumes in terms of sensitivity or confidence ranges of the available estimates of the price elasticity of demand for the various categories of mail. Specifically, for any proposed postal rate structure, he urges the use of a range of estimates of price elasticity when adjusting the proposed rate structure for the probable effects of demand conditions on attainable postal volumes. However, use of a range of elasticity estimates necessarily provides a range of volume estimates and, hence, a range of associated rate adjustments. Yet, ultimately, a single rate, or a unique rate sched-

ule, must be established for each mail category. Thus, eventually, a single estimate of price elasticity must explicitly or implicitly be accepted for each category of postal service.

To resolve this perplexity, Dr. Cicchetti has proposed his alternative approach. This approach is based on the questionable premise, asserted at Tr. 28/9695, 9698, that [R. 17,383] the estimate of price elasticity used to establish the rate for each of the postal categories should be selected from that portion of the range of available elasticity estimates for the category that produces the smallest increases in the postal rate for the category. More precisely, at Tr. 28/9736-39, Dr. Cicchetti advocates using as the basis for postal rate setting that value of the price elasticity of demand for each mail category that lies two standard deviations away from the maximum likelihood point estimate of that price elasticity in the direction associated with the least markup of price over the initial value of average allocated cost, and hence corresponding to the least reduction in postal volume for the mail category. Clearly, adopting this approach results in adopting price elasticity estimates from the inelastic end of the confidence range for each mail category.

To appreciate the consequences of applying this approach, it must be recognized that the probability of observing values lying two or more standard deviations in a specified direction away from the mean of a normal distribution is less than 0.025. That is, such extreme values occur, on average, only once in 40 observations when the true mean of the distribution is the estimated mean.

Thus, if the estimated price elasticities for the various mail categories are all unbiased, adopting Dr. Cicchetti's [R. 17,384] proposed approach to

selecting price elasticities in each category can be expected to result in the attainment of lower postal volumes than expected—and correspondingly lower revenues than anticipated—in 97.5 percent of the mail categories. In general, in the absence of extreme good fortune, this outcome should cause the Postal Service to incur substantial deficits—deficits which might have to be financed out of general tax revenues. Even overlooking the legislative mandate directing the Postal Service to avoid such situations, it is difficult to understand why the adoption of a rate-setting policy that virtually inevitably will result in substantial subsidization of postal customers by taxpayers in general should be considered to be in the best interest of society.

To reduce the probability of this undesireable outcome while, simultaneously, appropriately controlling the likelihood that the Postal Service might obtain unacceptably high net revenues, the price elasticity estimates used in developing the postal rate structure should consist of the maximum likelihood point estimates for the various mail categories. In addition, to improve the accuracy of postal rate setting over time and, in so doing, to reduce the probability of revenue shortfalls and surpluses even further, ongoing efforts should be exerted to derive refined estimates of the price elasticities of demand for the various mail [R. 17,385] categories *and* of the cross-elasticities resulting from demand interdependence among mail categories. Nevertheless, despite Dr. Cicchetti's statements (at Tr. 28/9406-07) to the contrary, even in the absence of adequate estimates of cross-elasticities, the maximum likelihood point estimates of the price elasticities of the various mail categories should be systematically incorporated into postal rate setting, since these values constitute the best available un-

biased estimates of demand conditions affecting the postal categories.

Finally, it is important to recognize that, in general, there will be numerous postal rate structures capable of generating any required aggregate level of net revenue. Thus, the postal rate structure fulfilling the legislated revenue requirement is not unique. Rather, different initial cost allocations, and different price adjustment mechanisms, typically will generate noticeably different ultimate postal rate structures, corresponding to markedly different distributions of mail volumes among categories. Selection among the alternative price structures consistent with the legislated revenue requirement should not be permitted to evolve incidentally from the mechanical application of accounting allocation rules and compensatory adjustment mechanisms. The different rate structures and associated distributions of mail volumes among postal categories correspond to [R. 17,386] different distributions of welfare among postal service customers. Consequently, the design of postal rate structures should explicitly consider the implications of alternative structures for the distribution of welfare among identifiable groups within the society. To follow Dr. Cicchetti's prescriptions concerning cost allocation and pricing would, in my opinion, seriously—possibly irreparably—injure the ability of the Postal Service to assure fulfillment of its legislated revenue requirement and, consequently, could entail substantial redistributions of income among different groups within society.

[R. 17,387]

9. Q. HOW DOES CONSIDERATION OF DEMAND CONDITIONS CONTRIBUTE TO THE ATTAINMENT OF FAIRNESS AND ECONOMIC EFFICIENCY IN POSTAL SERVICE COST ALLOCATION AND PRICING DECISIONS?

A. It has been pointed out previously that Dr. Cicchetti and several other witnesses believe—apparently without benefit of substantial evidence—that most, if not all, Postal Service costs are attributable to individual mail categories. However, there are instances in which Dr. Cicchetti, and others, appear to confuse "attributable" and "allocable" costs, the latter deriving from the more accounting-oriented approaches. Dr. Cicchetti, in particular, has argued that demand characteristics, especially price elasticity, should not provide the basis for allocating any residual unattributable costs; and to this end, he recommends strict reliance on accounting rules. Yet, it is important to recognize that, in recommending any basis for allocations, such as accounting rules, some mail categories will necessarily be penalized. The direction and extent of that penalty is an important factor in distinguishing between alternative allocative mechanisms relative to equity, or fairness, criteria.

The court's finding in *NAGCP* I, to restrict the use of the inverse price elasticity rule in designing postal rate structures, does not rule out consideration of demand characteristics. Indeed, by statute, value of service derived, at least in part, from demand characteristics is specifically [R. 17,388] designated for consideration in postal rate setting. [11]

---

[11] See, *e.g.*, 39 U.S.C. § 3622(b)(5).

In addition, Dr. Moshman has demonstrated that accounting rules based alternatively on weight, volume or piece have dramatically different effects on cost allocation. Moreover, it is impossible to argue that any one of these rules is preferable on economic efficiency grounds. In light of this extreme variability in effects associated with the application of accounting rules, equity considerations strongly indicate that demand characteristics are *crucial* factors in pricing policy.

A basis of general agreement seems to be that "cost causality" should be pursued as far as practicable in allocation schemes. Accepting this principle, and recognizing the variability of outcomes associated with different criteria for allocating residual costs, it is reasonable to interpret the requirement of "fairness" in postal rates as implying that whatever allocation criterion is adopted, it should recognize the consequences of associated cost assignments for consumer choice in each market. In fact, Dr. Cicchetti (at Tr. 28/9383) explicitly acknowledges and advocates this precept.

To operationalize this conception of fairness, Dr. Cicchetti (at Tr. 28/9449, 9531, 9533, 9568-75) proposes [R. 17,389] the use of levelized, or equalized, markups of attributed and allocated costs to apportion among individual mail categories any institutional costs that remain after marginal costs have been attributed on the basis of cost causality *and* a portion of the residual institutional costs have been distributed on the basis of traditional accounting allocation rules. He states at Tr. 28/9531, "A levelized markup is a way to approximate equal returns on investment net of cost causality" for all mail categories. Then, at Tr. 28/9533, he asserts that use of such markups would comport with the legislative

requirement in 39 U.S.C. § 3622(b)(1) to establish and maintain a "fair and equitable" postal rate schedule. Thus, he clearly implies that levelized markups conform to his notion of fairness, expressed at Tr. 28/9380, involving "not appreciably affecting consumer choice."

Yet, appraising the impact of a postal rate structure on consumer choice in terms of the pattern of returns on investment earned by the Postal Service in different mail categories seems, at best, paradoxical. A more reasonable way to evaluate the effect of a postal rate structure on consumer choice is to examine the changes in the relative volumes projected in different mail categories as a result of adopting the rate structure. Prices set equal to marginal cost for various categories of postal services imply certain quantities of postal service demanded. If the relative [R. 17,390] volumes associated with cost assignments based on cost causality is preferred, a criterion for allocating institutional cost among mail categories that seriously disturbs those relative volumes should *not* be adopted without good reason. Particularly in the context of substantial uncertainty in outcomes, such a conservative approach appears clearly preferable.

Under these circumstances, demand considerations must play a major role in cost allocation. Indeed, Baumol and Bradford establish as a necessary condition for second best, or quasi-optimal, pricing that the price vector adopted ". . . must yield outputs that deviate by (approximately) the same proportion from those which would result from pricing at the marginal costs corresponding to the quasi-optimal output levels." [12] In other words, maintain-

[12] William J. Baumol and David F. Bradford, "Optimal Departures from Marginal Cost Pricing," *American Economic Review*, Vol. 60, June 1970, p. 268.

ing constancy in the ratio of outputs in various postal categories is desirable. To achieve this objective, prices should be raised relatively more in mail categories with comparatively inelastic demands, and relatively less in categories with comparatively elastic demands. Only with such price adjustments will the ratio of outputs remain constant.

It is also important to recognize that, if the [R. 17,391] constancy of relative outputs is accepted as a criterion to judge the effect of accounting rules on postal rate structures, it unavoidably follows that the inverse elasticity rule must be considered in some form.

If an accounting allocation rule is chosen to minimize the divergence of output proportions from those associated with a rate structure based on the distribution of costs attributable to cost causality, the outcome of that allocation rule will be precisely the same outcome associated with the inverse elasticity rule. Thus, explicitly or implicitly, *demand characteristics must be considered.* To disregard such factors is to give little weight to the consideration of fairness required by the statute.

Yet, it must also be recognized that fairness evaluated in terms of impacts on consumer choice is not the only criterion that might be applied to Postal Service cost allocation and pricing decisions. Rather, the choice of criteria for use in such decisions is quite broad. They might include economic efficiency and equity considerations, as well as other, politically mandated criteria.

In the presence of a natural monopoly, allocative efficiency generally requires that the prices of a multiproduct enterprise must be set above marginal costs by amounts that are inversely proportional to the elasticities of demand of the various outputs

produced by the enterprise. Its use has [R. 17,392] been urged in regulatory pricing by numerous notable economists [13] as a direct consequence of their recognition of the essential role of demand characteristics in assessing the implications of pricing criteria. The intuitive content of the inverse elasticity rule is that the loss in consumer surplus associated with deviations from marginal cost pricing will be minimized by raising prices most where the resultant effect on the quantity demanded will be least. That is, if marginal cost pricing is accepted as providing the best allocation or resources, applying the inverse elasticity rule is desirable on the basis that consumer surplus will be reduced by the smallest amount from the level attainable from the best allocation of resources. Thus, the inverse elasticity rule provides the second-best allocation of resources relative to the criterion of economic efficiency.

In addition, the use of the inverse elasticity rule to allocate institutional costs that are not attributable to specific products is similarly justified. Specifically, Melvyn A. Fuss has demonstrated that, if total costs have been conscientiously attributed to individual products whenever possible *and* if the residual institutional costs are invariant with respect to changes in the rate of output of [R. 17,393] any one of the products, application of the rule is once again warranted. [14] Moreover, Roman Weil [15] shows that such demand-based cost allocations have practical

---

[13] See, for example, Baumol and Bradford, *op. cit.*, pp. 265-283, and *Rebuttal Testimony of William Vickrey on Behalf of United States Postal Service Before the Postal Rate Commission*, USPS-RT-3, Docket No. R74-1, September 20, 1974.

[14] Fuss, *op. cit.*, p. 45.

[15] Roman L. Weil, Jr., "Allocating Joint Costs," *American Economic Review*, Vol. 58, December 1968, pp. 1342-1345.

managerial significance in inventory valuation and make-or-buy decisions. Thus, overall, the incorporation of demand consideration in Postal Service cost allocation and pricing decisions exhibits considerable theoretical and practical value in terms of both promoting fairness and facilitating managerial decision-making.

[R. 17,394]

10. Q. HOW VALID ARE DR. CICCHETTI'S ASSERTIONS THAT THE RATE AND FEE STRUCTURES ADOPTED BY THE POSTAL SERVICE CONSTITUTE MONOPOLISTIC PRICE DISCRIMINATION?

A. At Tr. 28/9379-81, 9391, 9402, 9485, 9487, 9590, 9627, 9655-56, 9706, 9708, Dr. Cicchetti has stated, or at least strongly implied, that the Postal Service has behaved like a price-discriminating monopolist. Such remarks suggesting that Postal Service pricing practices—and, particularly, their alleged reliance on demand characteristics—are discriminatory must be placed in proper perspective. Otherwise, Dr. Cicchetti's remarks are quite misleading.

Most restrictively, price discrimination implies that customers are being charged *different* prices for *identical* products or services. In this context, price discrimination should not be confused with establishing price differentials in markets for products with distinctly differing cost or performance characteristics, such as speed of delivery or degree of mailer preparation. Price differences between such products may be due, in part, to demand elasticity considerations or quality influences. However, such price differentials do not necessarily constitute price discrimination. Even Dr. Cicchetti, at Tr. 28/9402, admits this possibility when he acknowledges that

price differentials might reflect either differences in the cost of providing service, or natural monopoly situations in which average costs exceed marginal costs. Under these circumstances, [R. 17,395] Dr. Cicchetti accepts price differentials as "due" price discrimination.

To demonstrate "undue" price discrimination, it would be necessary to show that the establishment of two or more mail categories with different postal rates has not been based on corresponding differences in product or service attributes. Thus, Dr. Cicchetti correctly states (at Tr. 28/9380, 9485, 9627) that "undue" price discrimination is clearly being performed when a firm practices cross-subsidization by setting prices above marginal costs for some products, in order to generate sufficient revenues to offset prices set below marginal costs for other products. Typically, it is claimed that the prices below marginal costs are established to undercut competitors and, thereby, gain market penetration for the associated products. However, Dr. Cicchetti presents no empirical evidence indicating that the Postal Service performs this form of price discrimination.

Finally, under the least restrictive definition conceivable, price discrimination always exists. Market prices serve to discourage some uses of commodities or services, thereby discriminating against some potential users of the goods. However, this type of discrimination is a necessary element of any rationing device. Thus, Dr. Cicchetti is clearly incorrect when he alleges, at Tr. 28/9381, 9407-08, [R. 17,396] 9484-85, 9590, 9706-08, that the Postal Service's use of demand elasticities to establish prices designed to fulfill its legislated revenue requirement—particularly its alleged use of the inverse elasticity rule—is tantamount to behaving as a profit-maximizing, price-discriminating monopolist.

Observing the persistent and substantial deficits incurred by the Postal Service, it is difficult to accept the assertion that the Postal Service is actually maximizing its profits. In fact, if the assertion really is true, the National Association of Greeting Card Publishers should be thankful that postal services are being provided at all, instead of contesting *any* proposed rate structure. In any event, it is clear that caution should be exercised when using the term "price discrimination" to describe postal pricing practices, for the term only serves to obscure important issues by implying socially unacceptable motivations. What I believe, in fact, is that the Postal Service will be performing at its most socially desirable levels of service and output *only if* it establishes price differentials in markets for products characterized by distinctly different costs and/or performance characteristics.

[R. 18,949]
Before the
POSTAL RATE COMMISSION
Washington, D.C. 20268

Postal Rate and Fee Changes, 1980: Docket No. R80-1

Rebuttal Testimony of
DONALD MILLER
on behalf of the AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

November 3, 1980

[R. 18,950] I am Donald Miller, president and publisher of the *Sedalia Democrat* in Sedalia, Missouri. I have served in this capacity since 1977. Prior to that, I was vice president of operations for the *San Antonio Express* and *News* for three years and was also with Harte-Hanks Newspapers, as the assistant vice president for operations.

I am here today to discuss the impact of continued postal rate increases on my newspaper and to urge the Postal Rate Commission not to raise our rates any further..

The *Democrat* is a daily and Sunday newspaper which has been serving the west-central area of Missouri for over 111 years. The *Democrat* is the primary source of news for all of Pettis and Benton Counties and for parts of Cooper, Monteau, Morgan, Henry, Jackson and Saline counties.

The area we serve is located on the northern edge of the Lake of the Ozarks and the Ozark Mountains—an area known for its many isolated and low-income residents. It also has an extremely large number of elderly and retired citizens.

Missouri has a long newspaper history. The first newspaper—the *Missouri Gazette*—was published in 1808 by Joseph Charless. It was published in St. Louis for the territory which was not yet Missouri. Mr. Charless began publishing at

this time at the urging of Governor Meriweather Lewis, who wanted a newspaper established so that the new laws, which were to be enacted when the territorial legislature met in June 1808, could be published and distributed to the people.

In 1867, the Editor and Publishers Association was founded in St. Louis—the group which today is known as the Missouri Press Association, [R. 18,951] one of the oldest and most active of the state press associations in our country.

And, also, as you may know, the prestigious University of Missouri School of Journalism was founded in Columbia in the year 1908.

As you can see, newspapers have been important to Missourians since even before they were part of a bonafide state. In the early days, we were a crossroads for westward traffic and, therefore, were also a center for information. After 1850, the year which marked the end of pioneer journalism in our state, news across telegraph wires flowed into our area from the East and from Chicago and New Orleans. This information was relayed to interior communities and then was moved farther west by Pony Express. Missouri was, by the way, an eastern terminus for the Pony Express.

The *Sedalia Democrat* came on the scene in 1870's and has provided news and information to west central Missouri ever since.

We serve a relatively isolated and compact area, approximately 80 miles from North to South and 50 miles from East to West. There is no local television station except for a public service station operated by Central Missouri State University in Warrensburg, Missouri. Most of the area gets fringe television reception from either Kansas City, Jefferson City or Columbia, but none of these stations carries any significant amount of Sedalia-area local news.

The local radio stations in Pettis County are either daylight broadcasters only or have signals which are transmitted over a portion of this area. The dominant radio station in Pettis and

Benton Counties is a Kansas City station which does not carry mid-Missouri local news.

[R. 18,952] Due to the rural nature of most of the *Democrat's* service area, the *Sedalia Democrat* traditionally has relied upon the post office for delivery of a significant portion of its newspapers.

For example, in January of 1973, nearly 5,650 subscribers received the *Democrat* by mail. Our total circulation then, as it is now, was about 16,000. These were mailed at a total cost to the *Democrat* of $38,963. Today, our mail circulation has dropped to 2,912 and it costs $132,417 to have the newspapers delivered by the Postal Service. Sixty-one percent of our copies must be mailed outside the county. We presort 95 percent of our mail circulation to carrier route.

We have been forced to pass along some of these steep increases to our readers. Many of these readers, primarily elderly people on fixed incomes, cite their inability to pay the higher rates when they stop their subscription to our newspaper. By September of this year, over 3,000 subscribers had stopped receiving the *Sedalia Democrat* by mail, or over one-half of the total mail circulation of the newspaper. (See Exhibit ANPA R-E)

Unfortunately, I never anticipated that I might be called on to testify on this subject or I would have saved some of the literally dozens of letters that I have received from readers who state that the postal delivery of the newspaper is simply priced out of their reach.

These are not readers who receive other newspapers, such as *The Wall Street Journal*, but elderly and retired people who desire to receive news of their area but who can afford our present rate of $3.95 per month. And this rate does not even cover our actual costs for postage, newsprint and other direct material expense. (See Exhibit ANPA R-F)

[R. 18,953] When in Washington, D.C., it may be easy to forget that many of our country's citizens, including many

elderly and retired, still live in rural areas and are significantly affected by any change in the second-class postage rate. We would urge the Postal Rate Commission *not* to increase our mail rates.

R. 18,954

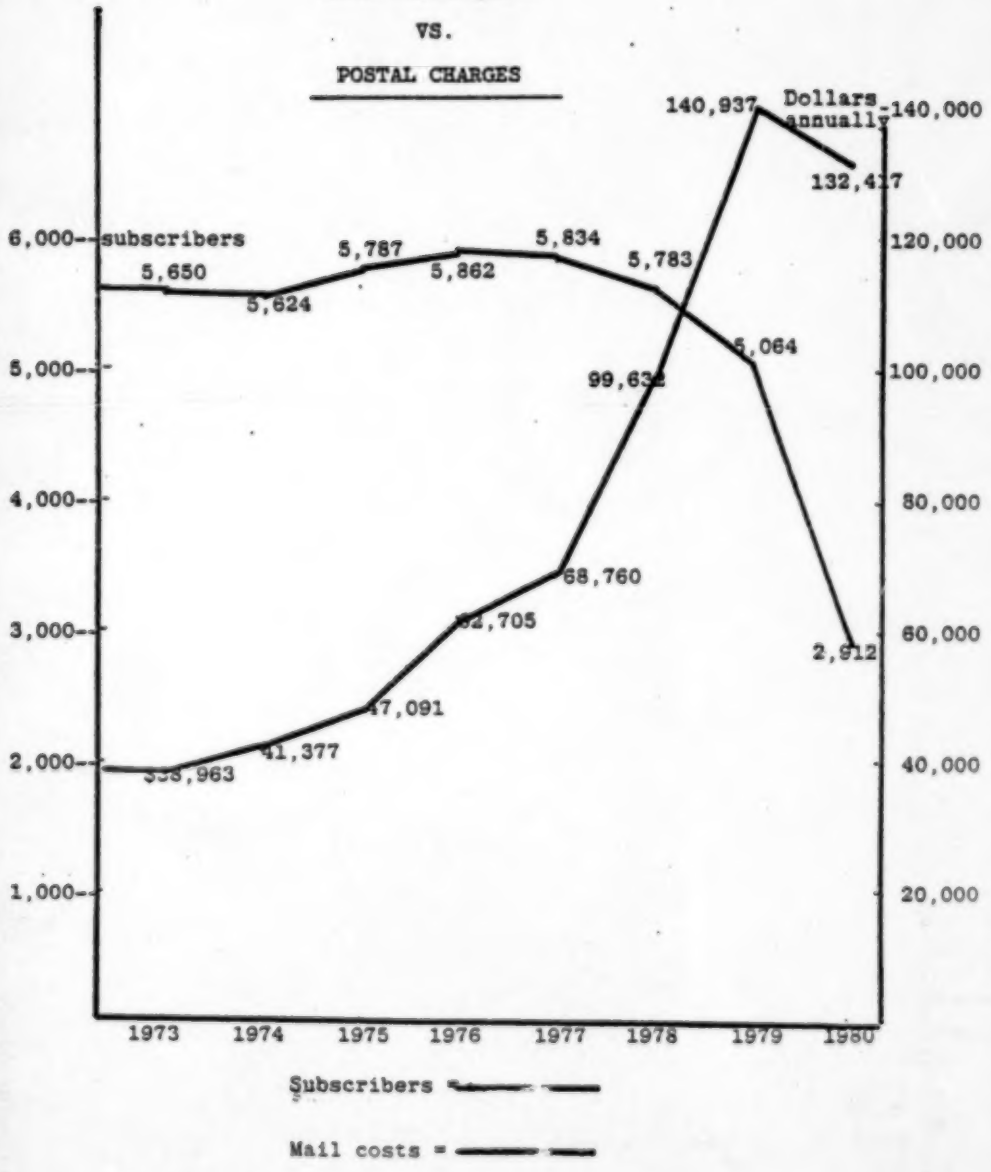
Exhibit ANPA R-E

SEDALIA DEMOCRAT CO.

MAIL SUBSCRIBERS

VS.

POSTAL CHARGES

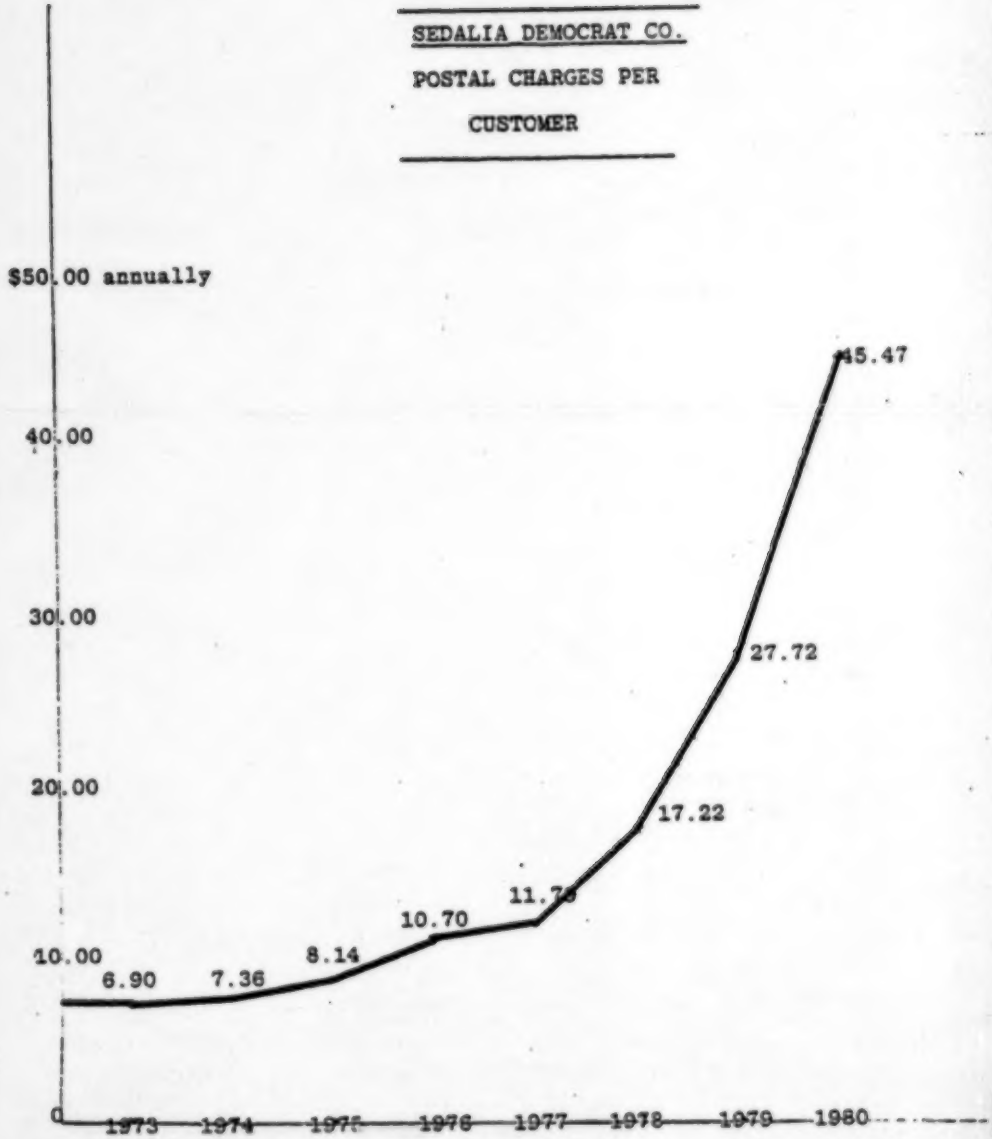


R. 18,955

Exhibit ANPA R-F

SEDALIA DEMOCRAT CO.

POSTAL CHARGES PER CUSTOMER



Testimony Of Frederick G. Harris (Direct)

[R. 19,539] My name is Frederick G. Harris. I am Vice President/Finance of Dow Jones & Company, Inc., with offices at 22 Cortlandt Street, New York, New York 10007.

Dow Jones is a publishing and communications company. The Company publishes national business and financial publications and information services, general-interest community newspapers and special interest books. Dow Jones' major national publications and services are *The Wall Street Journal*, a daily newspaper with the largest circulation of any daily newspaper in the country, *Barron's National Business and Financial Weekly*, and Dow Jones News Services. Dow Jones is also the parent corporation for Ottaway Newspapers, Inc. a wholly-owned subsidiary, which publishes twenty general interest daily and six Sunday newspapers.

I joined Dow Jones in 1956 as Chief Accountant, and was named Assistant Treasurer and Assistant Comptroller in 1962. In 1970, I became Comptroller and Assistant Secretary of the Company. Subsequently, in 1976, I was named Vice President and Comptroller. In 1977 I was appointed to my present position. Prior to my association with Dow Jones, [R. 19,540] I was employed as a staff accountant with Lybrand, Ross Bros. & Montgomery (now Coopers & Lybrand). I hold a Bachelor of Science degree in Business Administration from Ohio State University.

The purpose of my testimony is to illustrate the impact the dramatic increases in second class postage rates since postal reorganization have had upon Dow Jones, and, in particular, our major national publications, *The Wall Street Journal* and *Barron's*. My testimony will also demonstrate the impact of the proposal by the Officer of the Commission. I will then address the problem of passing on price increases to our subscribers and advertisers.

In 1971, Dow Jones spent a total of $6,873,000 on second class postage. This included *The Wall Street Journal*, *Barron's*

and *The National Observer*. In 1980 we project our second class postal cost under current rates to be $48,258,000 for *The Wall Street Journal* and *Barron's*. In 1977, we terminated publication of *The National Observer*. The following is a quote from Warren Phillips, our Chairman, concerning our decision to cease publication:

> "We do not foresee the prospect of recruiting enough readers or advertisers, despite current linage gains, to offset the rising cost trend and give The Observer hope for economic health in the future. The sharply rising trend of second class postal delivery rates—up over two hundred percent since 1971, the highest percentage increase of any cost category and headed still higher—has not helped either. . . ."

[R. 19,541] Under the proposal of the Officer of the Commission, the second class postal cost using 1980 volume for *The Wall Street Journal* would rise to $60,022,000 and *Barron's* $1,931,000 for a total of $61,953,000. This would be an average cost per copy for *The Wall Street Journal* of 17.9 cents and for *Barron's* 19.7 cents. By comparison, in 1979 the net profit for the entire corporation was $51,063,000. I have attached a chart identified as Chart A illustrating the enormous rise in the second class postage cost from 1971 to 1980, and the cost under the proposal by the Officer of the Commission.

We consider Dow Jones to be one of the leading publishers in the country and are quite proud of the success of *The Wall Street Journal* being the largest daily newspaper in the United States. Despite this success, postal rates have had a dramatic impact upon our company. For example, the operating profit margin of *The Wall Street Journal* fell from 30.4 percent in 1975 to 25.3 percent in 1979. In 1971 *The Wall Street Journal* accounted for about 94 percent of the Company's net income. In 1979 it accounted for about 59 percent. During the period 1969-1979 the compounded growth rate of *The Wall Street Journal* was 4.6 percent, while the compounded growth rate of the Consumer Price Index for that same period of time was 7.1 percent. We believe the heavy postal increases have been the major factor causing these shifts.

[R. 19,542] In addition, there has been a dramatic increase in the percentage of second class postage expense in proportion to net income for *The Wall Street Journal* and the company as a whole. In 1971, the percentage of second class postage expenses to net income for *The Wall Street Journal* was 43.1 percent. By 1979 it had risen to 125 percent. For the first nine months of 1980 it is 140.3 percent. In 1971 second class postage in relation to the net income for the entire company including all subsidiaries constituted 35.6 percent. In 1979 it constituted 81.4 percent and through the first nine months of 1980 it constituted 95.8 percent.

We have not felt that we could pass on the full postal increase during the past decade to our subscribers and advertisers. We have, however, substantially increased our subscription and advertising prices. During the period 1971-1979 we increased our subscription prices 57 percent and our advertising linage rate 82.6 percent. By the end of 1980 we will have increased our subscription price by a total of 80 percent and our advertising rate by 116.5 percent. This contrasts dramatically with postal increases from 1971 through 1979 going up about 483 percent and projected to increase to 554 pecent by the end of 1980.

In 1971 the second class postal cost constituted 15.3 percent of the subscription price of *The Wall Street Journal* and in 1979 it constituted almost 57 percent of the subscription price. I have attached a chart identified as Chart B [R. 19,543] demonstrating comparative increases in postal expenses to net income and to subscription and advertising increases.

In addition to substantial price increases, we have been able to maintain a substantial profit for *The Wall Street Journal* in the following manner:

a. We have extensively automated our plants through satellite printing and automated mail rooms. This has resulted in a reduction in the number of production employees by about 30 percent.

b. We expanded our printing facilities from 9 in 1971 to 12 by the end of 1979.

c. In 1971 we began using a lighter weight newsprint and in 1974 we reduced the page width of the *Journal* by nine percent.

d. We have also maintained a substantial profit as a corporation through diversification.

Thus, we have been able to sustain the strain of heavy postal increases primarily because of labor-saving automation which we will not be able to repeat and because of being a diversified corporation. If the Officer of the Commission proposal is adopted we will have no choice but to divert more and more of the circulation to private delivery.

[R. 19,544] I have outlined the impact that postal increases have had upon Dow Jones. They have been a contributing factor to the decision to cease publication of *The National Observer*. They have caused the Company to develop a private delivery system. They have been a major factor in causing the profit margin of the largest newspaper in the United States to decline. If the postal increases of the past have had such a dramatic impact on a company as fortunate as we are, imagine the impact they have had on small publications.

[R.19,545]

CHART A

[R.19,545] SECOND CLASS POSTAGE RATES

	(in thousands) 1971	(in thousands) 1980 Projection	OOC Proposal (in thousands) with Red Tag	% Increase over current costs
Wall Street Journal	$6,108 (2.1¢)	$46,742 (13.9¢)	$60,022 (17.9¢)	28.4
Barron's	276 (2.6¢)	1,516 (15.4¢)	1,931 (19.7¢)	27.4
National Observer	489 (1.8¢)			
DJ Combined	$6,873	$48,258	$61,953	

[R. 19,546]

CHART B

Percentage of Second Class Postal Expense to Net Income

	1971	1979	1st 9 mos. 1980
Wall Street Journal % or postage expense to net income	43.1%	125.0%	140.3%
Consolidated % of postage expense to net income	35.6%	81.4%	95.8%

Percentage of Postal Cost to Subscription Price

	1971	1979	1980
Wall Street Journal			
Annual postage cost/copy	$5.36	$31.24	$35.05
Subscription price at year-end	$35.00	$55.00	$63.00
Postage cost/copy as a % of circulation price	15.3%	56.8%	55.6%

Price Increases in Comparison to Postal Increases

	1971	1979	% Inc.	Projected 1980	% Inc.
Wall Street Journal					
Subscription price	$35.00	$55.00	57.1	$63.00	80.0
National open line ad. rate	11.18	20.42	82.6	24.21	116.5
Annual average postal cost per copy	5.36	31.24	482.8	35.05	553.9

Testimony Of Dow Jones Witness King (Direct)

[R. 8143] categories. Thus, the existing understatement in rate differential should be eliminated, and the rate structure should mirror the cost structure.

Pursuant to this objective, I have developed Exhibit DJ-6. In the first three columns of this exhibit, I developed the weighted average revenue per piece which the Postal Service would derive from the piece rate based on its projection of the mix of presort categories. That weighted average will be 5.85 cents per piece. In the next column I have applied the cost differential shown by Mr. Madison between the B categories and the A and C categories, keeping constant the 5.4 cents applicable to Category B. Applied without adjustment these rates would yield an excessive amount of revenue, 6.15 cents relative to 5.85 cents sought in the proposed rates. I have therefore adjusted these rates downward by a factor of .9512 to derive rates of 7.7 cents for category A, 5.1 cents for category B, and 3.8 cents for category C. Assuming there is no change in the mix of categories, these rates would generate the same 5.85 cents sought by the proposed rates.

A final characteristic which should be reflected in the rate structure is drop shipments. In order to speed mail deliveries, many mailers go to the expense of entering mail into the system either at or close to the destination city or SCF. This worksharing activity saves the Postal Service not only the cost of handling the mail at an entry postal facility but the transportation cost between the origin city and the destination city or zone. The appropriate method for recognizing this cost-saving characteristic would be a lower rate based on the coincidence between the entry point and the destination of the mail.

[R. 8146]

Exhibit DJ-3

Daily Newspaper Revenue per Piece

1970	2.5¢
1971	2.5
1972	2.9
1973	3.2
1974	3.7
1975	3.9
1976	4.2
1977	5.5
1978	7.2

Source: US Postal Service, Revenue-Cost Analysis.

Testimony Of Dow Jones Witness Wilson (Rebuttal)

[R. 19,558] *Question #4:*

Would you please describe the National Delivery Service.

Answer:

National Delivery Service is a wholly-owned subsidiary of Dow Jones & Company, Inc., whose responsibility it is to investigate areas where they can provide carrier delivery service to our customers either through their own employees or independent contractors, at a weighted average cost to Dow Jones & Co., Inc. which is less than the cost of delivery through the U.S. Postal Service and with service equal to or better than the U.S. Postal Service. It is also their responsibility to deliver these copies either with their own employees, or to see that the copies are delivered by the employees of an independent contractor. In addition, it is the function of National Delivery

Service to investigate and, if feasible, enter into other activities associated with the delivery of subscription copies of Dow Jones publications.

Question #5:

In 1971, how many subscription copies of *The Wall Street Journal* were being delivered by private delivery?

Answer:

17,000.

[R. 19,559] *Question #6:*

In 1979, what was the year-end figure for copies being delivered by private delivery?

Answer:

275,000.

Question #7:

Please list the number of copies of *The Wall Street Journal* being delivered by private delivery in each year beginning in 1975 with the average cost per copy.

Answer:

Year	Daily Copies	Unit Cost	Period
1975	47,000	.052	Year End
1976	70,000	.066	Yearly Average
1977	124,000	.069	Yearly Average
1978	176,000	.08	Yearly Average
1979	247,000	.10	Yearly Average

[R. 19,560] *Question #8:*

a. How many current subscription copies of *The Wall Street Journal* are being delivered by private delivery?

Answer:

As of October 19, 1980—334,549.

b. What is the average cost per copy?

Answer:

No cost figures are maintained on an issue-by-issue basis. However, the most recent cost figures available (prepared by our accounting department) are for the second quarter of 1980 and indicate an average cost per copy for the second quarter of 11.2¢ per copy.

Question #9:

What percentage of subscription circulation does this represent?

Answer:

19.3 percent.

[R. 18,495] Rebuttal Testimony Of Robert Cohen

My name is Robert Cohen. I am Associate Publisher and General Manager of THE NEW REPUBLIC. On November 14 of this year, THE NEW REPUBLIC celebrates its 66th year of publication, and I am proud to report that our editorial product is as strong and vital to our readers today as it had ever been. However, I have come here today to tell you frankly that, despite this editorial vitality, THE NEW REPUBLIC is no longer a viable business proposition for anyone except the very wealthy, the only ones among us who can afford to underwrite the business losses of the magazine, now amounting to hundreds of thousands of dollars per year.

Despite a high degree of subscriber loyalty and subscription prices of $28 per year—hardly a giveaway—, the business losses of THE NEW REPUBLIC have continued to mount dramatically over the last five years. The reason for this is clear: postal costs for our first, second, and third class mailings have risen from 10% of our total operating expenses in 1976 to nearly 30% today. The impact of postal rate increases since passage of the 1970 Postal Reorganization Act has been disastrous to our publication—and has threatened the existence of many other independent journals like ours.

I urge you to exercise maximum restraint in imposing further increases in second class postal rates. We simply must have more time to catch up with this four year explosion in our operating costs.

[R. 18,496] Independent journals of opinion and special interest magazines such as THE NEW REPUBLIC, light in weight and with relatively modest circulation, have suffered more acutely than others from the last 10 years of postal rate increases. Heavy emphasis on per piece charges, first implemented in R71-1 before this body, and the later introduction of worksharing discounts which we cannot economically take advantage of for the majority of our copies, have combined to make our second class rate increases exceed the norm. Specifically, while average second class rates have increased 450% since 1970, for THE NEW REPUBLIC they have risen 600%.

We publish 48 times a year. A typical issue of our magazine mailed on September 12 cost us $8700 in postal expenses, a 25% increase over what it would have cost us to mail the same issue less than a year and a half ago. Four years ago, that same issue with the same subscription circulation cost only $2800 to mail, and ten years ago—only $1250 (see Exhibit I). With total circulation and advertising revenues of just under $2 million this year, our estimated second class postal bill alone will run close to $420,000. This is a financial nightmare. At the OOC proposed rates the second class postal bill would be raised to $530,000.

We rely on subscription income for the bulk of our revenues. A typical issue of THE NEW REPUBLIC contains less than 20% advertising. As a result, we have attempted to recover postal cost increases through raising subscription [R. 18,497] prices—now at $28 a year. Our subscription price will soon have to be close to $40 a year, a steep increase for our subscribers, most of whom are not affluent—including students, professors, libraries.

The effect of rapid subscription price increases, as we race to keep up with the postal burden, will be to drive away subscribers unable or unwilling to afford THE NEW REPUBLIC. And because we are relatively small in circulation size, we cannot increase newsstand sales or move into alternate delivery channels as easily as can larger, more affluent publishers. From a publisher's standpoint, it would be a Pyrrhic victory to have finally won the battle against rising postal costs but with a subscription base half the size of today's.

In addition, because of the controversial, political nature of our magazine, and its relatively modest circulation, we do not attract as many advertisers as other publications with similar readership characteristics. Therefore, it is much more difficult for us, than for larger publishers, to rely on the kind of growth in advertising pages and revenue which might help offset rising postal costs. Thus, THE NEW REPUBLIC is caught in a tragic bind—faced with second class rate increases exceeding the average and unable to quickly recover our cost increases through increased subscription, newsstand, or advertising revenue. Our financial losses have continued to accelerate as the postal burden has grown heavier.

[R. 18,498] More important than the magnitude of our circulation is the quality of our editorial product. We do not have a large editorial staff and must rely on paid freelance contributors for most of our editorial material. As such, we must compete in the marketplace for this material, which has also grown increasingly expensive. The rising costs of distributing our magazine have cut into our ability to compete fairly for editorial product because scarce resources are being diverted from editorial investment to mailing expenses.

At this time, the Postal Rate Commission is faced with two proposals for second class rate increases in 1981—from the Postal Service and the Officer of the Commission. Red tag service alone, when and if implemented, will cost us an additional $1200 per issue—or $55,000 per year. In light of this 14% increase already mandated by the Commission and the Gov-

ernors of the Postal Service, we urge maximum restraint in the adoption of any further second class increases. As shown in Exhibit II, the proposal of the Officer of the Commission, if adopted, will mean a mailing expense of over $11,000 per issue—a 27% increase for THE NEW REPUBLIC. Given our current shaky financial picture, such an increase would be devastating.

To offset the effect of rising postal costs, THE NEW REPUBLIC has joined with THE NATIONAL REVIEW to form the Corporation for Maintaining Editorial Diversity in America. This foundation, when approved as a non-profit institution by the Internal Revenue Service, will encourage and help [R. 18,499] maintain significant independent journals of opinion by making grants or low-interest loans to these publications without regard to their political views. Neither THE NEW REPUBLIC nor NATIONAL REVIEW chooses to pursue non-profit status, financially attractive as it might be. In fact, we welcome the opportunity to pay our fair share of taxes as profit making enterprises. We must maintain our ability to engage in and stimulate controversial political dialogue and to endorse political candidates of our choice, options unavailable to the non-profit sector. We hope that the new foundation will be able to channel sufficient funds to our publications and other independent journals to at least partially offset the postal burden. At this time, however, we have no assurance that even this modest attempt to help us shoulder extensive postal rate increases will significantly reduce our cost burden.

THE NEW REPUBLIC is not a typical commercial publishing enterprise. Past and present owners of this magazine have not published it for profit or personal financial gain, least of all the current owner, who has already spent considerable sums over the past six years to sustain the publication. Our motive here is not greed, but simply survival. We firmly believe that the public interest is best served by a vigorous exchange of ideas, encouraged by a free press. Independent journals of opinion like THE NEW REPUBLIC play a vital role in this exchange, but we are doomed if we cannot have access to an affordable postal distribution system.

[R. 18,500]
EXHIBIT I

The Cost of Mailing the September 20, 1980 Issue of THE NEW REPUBLIC in . . .

	Per Issue	Per Year
June 1970	$1248	$ 59,904
June 1976	$2828	$135,744
June 1977	$3526	$169,248
April 1978	$4394	$210,912
June 1978	$5250	$257,000
June 1979	$6982	$335,136
Today—September 1980	$8706	$417,888

Increases:	1976-present	+208%
	1970-present	+598%

[R. 18,501]
EXHIBIT II

Effect of Proposed 1981 Postage Increases on Per Issue Mailing Costs of THE NEW REPUBLIC

	Postal Service Proposal	OOC Proposal
Current Cost	$8706	$8706
Plus: Red Tag Surcharge	1152	1152
Cost with Red Tag	$9858	$9858
Plus: Additional Proposed Increases	40	1208
TOTAL PER ISSUE	$9898	$11,066
TOTAL PER YEAR	$475,104	$531,158
Increases vs. Today	+13.7%	+27.1%

Testimony Of March Of Dimes Witness Haldi (Direct)

VI.

[R. 11,086] Cost Segment 15—Building Occupancy

Building occupancy costs are subdivided into two major components: (1) rents, and (2) fuel and utilities. The variability and attributability of fuel and utilities are determined on the basis of actual accrued cost, square footage, and usage. The percentage of total "Rents" that is considered variable is determined by a survey of space usage combined with an estimate of the average weighted current rental value of space occupied by the Postal Service. The estimated current rental value is sometimes referred to as the "shadow price" of space rented or owned by the Postal Service. The use of shadow price valuation for space was adopted by the Commission in Docket No. R76-1. According to testimony of USPS Witness Sherwin, shadow prices were determined as follows:

> The estimate of rental values was intended to reflect the annual rental (fall of 1974) that would be payable, based on the "*as is*" physical conditions of buildings. For buildings presently under lease, it should reflect the rents that would be payable if a new lease were negotiated and all conditions, other than price, remained the same. For buildings owned by the USPS, it was intended to be the current annual rental if it were acquired under a long-term commercial lease. [Docket No. R76-1, Tr., p. 9805, 11. 2-10]

The use of shadow price, or replacement cost valuation in this cost component gives rise to several anomalies:

- Total attribution of rents is "capped" by actual accrued cost.
- Fuel and utility payments which are an implicit part of actual rental payments are fully attributed, while fuel and utility payments paid directly by the Postal Service are only 54 percent attributed.

[R. 11,087]

- The costing of the square footage of attributable and nonattributable space is totally nonsymmetric.

- Services from capital goods are valued entirely differentially.

Total Cost Attribution is Limited by Actual Accrued Costs

In Docket No. R76-1 and again in Docket No. R77-1, the Commission limited total cost attribution of rents not to exceed 100 percent of actual accrued cost for rental payments. Thus, while the Commission was inclined to accept shadow price valuation, it limited the extent to which it was willing to include such valuations in rates. In effect, the Commission compromised the economic principles that motivate shadow price or replacement cost valuation, and in so doing created a hybrid cost concept. To illustrate, the Postal Service does not recover any more money through rates than it would if rents were 54 percent attributable (the same as fuel and utilities), and 46 percent of rents were treated as institutional. Yet greater recovery is probably the primary motivation of those who have in other forums advocated the adoption of replacement cost accounting. Here the effect is limited to the level of attribution.

Differential Treatment for Fuel and Utilities

In response to March of Dimes Interrogatory No. 7(b), Witness Alenier stated that for 61 percent of the square footage which the Postal Service leases, it pays directly for utilities of heat, electricity, water and sewage. (Tr., p. 6695.) For the remaining 39 percent of leased space, the cost of utilities is paid by the landlord and, presumably, is included in [R. 11,088] the rent. (Tr., p. 6723, 11. 2-3.) This differential treatment leads to a clear anomaly. By way of illustration, consider as a hypothetical situation that the Postal Service were to simply renegotiate all of its leases so that the landlord would pay the cost of fuel and other utilities, and the Postal Service would reimburse the landlord through increased rental payments of equivalent amount. In this situation, the total accrued cost of segment 15 has not changed. The Postal Service is not occupying any more or less space, nor is it utilizing its space any differently. The only changes envisioned by this hypothetical are (1) the stipulations in the lease regarding which party pays for the utili-

ties; (2) the amount of rent, adusted to take account of the agreement regarding who pays for the utilities; and (3) the specific accounts in which payments made by the Postal Service are recorded. Applying this hypothetical (which changes only form, not substance) with the way the Postal Service determines the attribution of rent would cause 100 percent of all fuel and utilities to be attributable. Alternatively, removing the payment for fuel and utilities from existing leases (and reducing rent accordingly) and paying for these expenses directly would reduce the level of attribution in cost segment 15.

Costing of Attributable and Nonattributable Square Footage is Nonsymmetrical

Under the present approach of attributing space costs the total value of the square footage of attributable space is arrived at using shadow prices. This total value is deducted from total accrued cost of rents (which reflect actual payments), and any residual amount is treated as nonattributable. Since this approach was adopted, there has not been any [R. 11,089] residual amount to treat as nonattributable. The fact that the cost of nonattributable space is developed as a residual may have become implicit. The anomaly here arises if attributable cost is derived as a residual, after using shadow prices to value the square footage of nonattributable space. If this reverse procedure were followed, rather than 100 percent of rents being attributable, it is conceivable that no more than 10 percent of all rents would be attributable.

As long as the Commission is unwilling to permit full recovery of the shadow price of all space occupied by the Postal Service, March of Dimes, *et al.* contend that the attribution of "rents" should be based on actual average cost per square foot.

Differential Treatment is Accorded to the Cost of Services from Different Types of Capital Goods

In response to March of Dimes Interrogatory Number 9(b) Witness Alenier states that the accrued cost for depreciation of vehicles is based on actual historical cost. (Tr., p. 6698). In

answer to part 9(e) of the same interrogatory, the use of shadow price valuation for leased space is justified on the basis that "Buildings have long economic lives and tend to appreciate over time." (Tr., p. 6698.) The fact that the value of buildings may appreciate over time does not justify the use of shadow price valuation for leased space versus historical cost for vehicles.

When a vehicle is ready to be retired from service its residual value is close to zero. By the same token, when the lease on a rental facility expires, the residual value of that lease and that space to the Postal Service is essentially zero. To the extent that the Postal Service must [R. 11,090] acquire a new vehicle to replace one that has been retired, it must pay the current market price for a new truck. Similarly, to the extent that the Postal Service must enter into a new lease to replace a previously rented facility, it must pay the current market price for space. The length of economic life is not a pertinent ecnomic consideration as to whether replacement cost valuation is appropriate.

The fact is, the Postal Service uses entirely different methods for costing the services of various capital goods which it uses. Ironically, this differential treatment leads to the anomaly that one of the capital costs which is fixed for the longest duration of time, and which is also fixed in terms of location and transferrability to other uses, (i.e., rents and depreciation of buildings) is treated as 100 percent variable and attributable, whereas the cost of other capital goods which are in general highly transferrable (depreciation of motor vehicles) are treated as 45 percent variable.

Until the Commission adopts replacement valuation uniformly for all cost segments, March of Dimes, *et al.*, recommend that (1) the attribution of rent and building depreciation be based on actual accrued cost; and (2) attribution of rent and building depreciation be limited to that portion which will vary within 3 years from the end of test year or, alternatively, attribution be treated as a specific fixed cost rather than a variable cost. If shadow price valuations are to be used, rent

and building depreciation should be treated as a reasonably assignable cost rather than as an attributable cost.

Testimony Of March Of Dimes Witness Haldi (Rebuttal)

[R. 19,252] *Basic Objectives*

Almost since its very inception, the Postal Rate Commission has been in the process of developing and refining what an economist would describe as the "cost function" of the Postal Service.[1] By this, I mean that the Commission has been endeavoring to learn more about the underlying behavior of postal costs—*i.e.*, how cost components interact, what factors actually *cause* costs to increase or decrease, and the extent to which costs change in response to changes in volume. The purpose of an economic cost function is to develop inanalytic terms the fundamental *causal relationship* between costs and output. The extensive records established in prior rate and mail classification cases, the lengthy discussions in the Commission's Opinions and Recommendations, along with the many millions of dollars worth of cost studies being undertaken Docket No. MC76-5, all combine to reflect a substantial growth in the body of knowledge relating to the Postal Service's cost function.

A primary objective underlying the desire to learn more about how costs behave has been, presumably, to improve the basis on which the Commission attributes costs. A secondary objective, I suspect, has been a hope that the Postal Service could achieve more cost-effective management if better knowledge concerning its cost function were available.

[R. 19,253] The Commission must, of course, determine its objectives for cost attribution within the law and the Court's interpretation of the law. In prior dockets, the Commission has increased the level of attribution above that proposed by the

---

[1] An economic cost function is not to be confused with the accounting functionalization of cost employed by Mr. Robertson. The two concepts are entirely different.

Postal Service, but the Commission has never stated that it sought to attribute a specific target or percentage of costs. Rather, studies of cost causation have always preceded attribution. The following questions raise some fundamental issues concerning objectives. Is the Commission's principal objective simply to achieve increasingly higher levels of attribution? Or is it the objective to achieve some specified but as yet unreached level of attribution, and then stop? Or is it the Commission's primary objective to learn what factors cause costs to be incurred and change, and to base attribution on causality?

OOC witness Robertson's approach to cost attribution needs to be assessed, first and foremost, in light of basic objectives. Viewed this way, it would appear that the OOC's primary motivation is simply to raise the level of attribution. The voluminous testimony by OOC witnesses in this Docket certainly does little or nothing to improve our knowledge about the "cost function" of the Postal Service.[2] By admission of the OOC witnesses [R. 19,254] themselves, they made no attempt to study variability,[3] or to improve upon or find better ways of determining peak load costs.[4]

The main thrust of witness Robertson's approach is to rely on basic functions and accounting classifications of costs. It is chiefly happenstance that Mr. Robertson includes among his functional costs more of the Postal Service's short-run variable costs. He then proceeds to use a variety of accounting formulas to allocate a number of common fixed costs among the different

---

[2] Only now are many of the cost-related studies commissioned in Docket No. MC76-5 becoming available: *e.g.*, the Current Cost Study and the Peak Load Cost Study. None of the OOC witnesses appear to have made any use of this recent information. It seems somewhat ironic that just when these efforts are beginning to bear fruit the OOC would embrace an approach based almost entirely on use of accounting classifications and accounting formulas for cost allocation.

[3] See Tr. 44/15,665—15,666.

[4] See Tr. 44/15,746—15,748.

classes of mail. Formulas such as those used by Mr. Robertson have been available to the Commission since the first rate case. It is important to recognize that if the approach advocated by Mr. Robertson were to be adopted, it would inevitably replace, not supplement, the type of causal analysis heretofore sought after and employed by the Postal Rate Commission. In terms of basic objectives, replacing a causal cost function approach with an accounting-formula approach can be justified only in terms of achieving some predetermined level of attribution.

[R. 9365]

Before the Postal Rate Commission
Washington, D.C.

Postal Rate and Fee Increases, 1980
Docket No. R80-1

Prepared Testimony
of
CHARLES J. CICCHETTI

Submitted on behalf of

The National Association of Greeting Card Publishers

August 1980

---

* * * *

[R. 9401] question of definition of marginal and avoided costs. Accordingly, I find some of Professor Wattles' apologies unnecessary. This is especially true since all the other interdependent cost adjustments are necessary for the development of guides for the pricing of postal services.

All this means that when cost causation is the pricing guide, we must ask additional questions. These are related to the time duration of the observation and possible interdependent cost and benefit effects on other goods and services. The question of cost causality is *not* superficial. Neither should its measurement be. As will be pointed out below this is not always observed by the Postal Service, which sometimes seems motivated by the form of cost causality versus its substance.

10. Q. CLARIFY FURTHER YOUR VIEWS ON SUCH DEMAND ISSUES AS PRICE DISCRIMINATION, VALUE OF SERVICE AND INVERSE ELASTICITY.

A. (i) Price Discrimination

One could say a good deal concerning the first two items, as much has been written. I shall try to condense the discussion by relying primarily on the conclusions reached by Professor Bonbright [R. 9402] for value of service.

A distinction is sometimes made between due and undue price discrimination. "Due" discrimination is usually considered justified, if (a) the costs of service differ, or (b) marginal costs are below average costs because of decreasing costs and economies of scale. Undue discrimination refers to the sheer exercise of monopoly power of either the market or regulated type.

(ii) Value of Service

Value of service pricing is the principle espoused by advocates of price differentiation for reasons other than costs. Accordingly whether, and when, it is justified depends upon the extent of "due" or "undue" price discrimination. I find myself in more or less agreement with Professor Bonbright on the matter of value of service. I shall partially paraphrase his four principal policy recommendations in order to state my own views.

- Value of service should be limited even for consideration to cases in which marginal cost is decreasing.
- Value of service should not be permitted unless it can be expected to lower the prices paid by those "discriminated" against.

[R. 9403] • If value of service pricing is established the prices charged should at least equal short-run incremental cost plus those "long-run" incremental costs expected to indefinitely persist in the future.

• Value of service pricing should be prohibited even if the other criteria are met, if it would seriously prejudice other competitive relationships.

In my view, there are very few, if any, real world privately operated regulated industries that can pass all four of these tests. Accordingly, I strongly support the courts and regulators who cast a prohibitive barrier against the value of service principle. This is especially true when some services have competition and others are statutorily protected from competition. This is the case with competing package delivery services on the one hand and anti-competitive Private Express Laws on the other hand.

There is also considerable evidence that indicates that the Postal Service faces increasing cost. Accordingly, the first two restrictions for the use of value of service pricing would apply. The [R. 9404] large claim of joint cost followed by the value of service judgment of R80-1 seems to violate at least three of the four conditions limiting value of service as described by Professor Bonbright.

(iii) Inverse Elasticity Pricing Rule

The final related issue is the so-called inverse price elasticity rule. As a cost allocation device it is a closely related cousin to the value of service pricing principle. It is usually stated quite mathematically; and, therefore, it has a more objective appearance. One should not be misled by its apparent scientific content. All the reservations I have expressed concerning value of service pricing and four others I

shall now discuss should restrict the use of the inverse price elasticity pricing rule.

- Given the objective and scientific appearance of the inverse price elasticity rule, when it is invoked there is a tendency to exaggerate the importance in postal rate proceedings of unallocable joint, institutional, residual and overhead costs. This undermines the most important pricing principle, which requires regulatory prices to reflect the consequence of additional (or less) consumption on total system costs. Exaggerating the proportion [R. 9405] of total costs which are not based on cost causation encourages price discrimination and unfair competition. For these reasons alone I support the court's finding in NAGCP I to restrict the use of the inverse price elasticity rule in Postal Rate Design.

- The measurement of the price elasticity of demand for the purposes of establishing a cost allocation is kindly called an art rather than a science. Judgment abounds. There is the selection of the data base dilemma. [Cross section, time series (which years?), pooled.] There is the model specification decision (what other variables or equations to consider or omit). There is the statistical estimation technique question. There is the point estimate versus range, versus the question of whether to err on one side of the range or the other. As someone who has testified on the use of price elasticity for the somewhat less controversial purpose of estimating total revenue, I can attest to the amount of "judgment" that is involved. When judgmentally determined statistical estimates are pushed through mathematical formulae to produce a single cost allocation that involves billions of dollars (as would be and was the case in a Postal Rate proceeding) [R. 9406] we should all pause and re-

ject such a step as nothing more than judgment, and not a mathematically contrived prescription for economic efficiency.

- As an economic theorist I have also considered the inverse price elasticity rule, both in its earlier form (1927) in the *Economic Journal* as developed by Professor Ramsey and its more modern (1970) discussion by Professors Baumol and Bradford in the *American Economic Review*. While the economists who developed this theoretical insight recognize an important additional condition, most, if not all, advocates of the use of the inverse price elasticity rule in practice have ignored it. I am specifically referring to the complexities that arise mathematically, statistically and practically when demand interdependence is present. Such examples as peak and off peak service and options to select various postal services or transport services are examples of demand interdependence.

  It is insufficient even theoretically speaking to merely consider the "own" or specific service price elasticity. Instead a more complex set of [R. 9407] formulae as I have published with John Jurewitz in *Perspective on Power* and *Studies in Electric Utility Regulation* must be considered. Practitioners will, of course, claim they cannot or have not estimated the appropriate cross elasticities of demand in either a single equation or simultaneous fashion. Any applications of the inverse price elasticity rule which do not include relevant demand interdependence have no prior claim on economic efficiency.

- The final issue I shall discuss on the inverse price elasticity rule at this time was also considered by Jurewitz and myself. There are two points to make. For the case in which decreasing marginal costs

(economies of scale) are present the regulatory price *may* have to be set above the competitive price (defined as equal to marginal cost). However, economic efficiency requires the least possible deviation from marginal cost. The monopolist (discriminating or not) will, if left to his/her own devices, attempt to increase the prices charged to a far greater extent than those subject to inverse price elasticity. Adjusting for this difference is almost never recognized in practice, and full monopoly mark-ups based upon the inverse of the [R. 9408] price elasticity are usually proposed.

The second point is even more disturbing. If marginal costs are increasing, regulated prices must be reduced from marginal costs in order to keep the enterprise from earning too much. If diseconomies of scale are present (a normal circumstance and one which some believe is applicable to all or significant portions of the U.S. Postal Service) marginal costs will be increasing. Under these conditions the regulated price will be below the competitive price which equals marginal cost. However, the monopolist price it still above marginal cost. The most price *inelastic* customer would receive the largest price *decrease under regulation* and the largest price *increase under monopoly* pricing. In other words, demand side factors should nearly always be omitted from postal service pricing decisions. Cost causality should be the principle used to set postal prices. It should be given more than the lip service it now receives, before jumping to value of service/judgment.

[R. 9409] Part II. POSTAL PRICING PAST AND PRESENT

11. Q. HAVE YOU REVIEWED THE HISTORY OF POSTAL PRICING IN THE UNITED STATES?

IF YES, PLEASE INDICATE THE MATERIAL YOU HAVE REVIEWED.

A. Quite obviously from my statement of professional experience this case is my first involvement in a postal rate case. Accordingly, I have endeavored to examine a significant body of economic literature concerning the costing and pricing practices of postal services.

(a) My primary resource materials have been the prior Postal Rate Commission general rate decisions (R74-1 and R77-1), the court of appeal decisions in NAGCP I and NAGCP III, and the economic testimony submitted in this proceeding.

(b) I have also found two journal articles particularly important.

Kennedy, Jane, "Structure and Policy in Postal Rates," *Journal of Political Economy*, LSV, June 1957, No. 3

Wattles, George M., "The Rates and Costs of the United States Postal Service," *Journal of Law and Economics*, XVI(1), April 1973

Several books have also been informative.

[R. 9410] Backman, Jules, *Rate Policies and Practices of the United States Post Office*, Prepared for the Magazine Publishers Association, New York, 1953

Baratz, Morton S., *The Economics of the Postal Service*, Washington, D.C., Public Affairs Press, 1962

Haldi, John, *Postal Monopoly*, Washington, D.C.: American Enterprise Institute, 1974

Smith, A.D., *The Development of Rates of Rates of Postage*, London: George Allen and Unwin, Ltd., 1917

U.S. Department of Justice, *Changing The Private Express Laws*, Washington, D.C., U.S. Government Printing Office, 1977

(c) Additionally, I have been able to review several congressional hearings; the several volumes of the Freeman Commission's *Report of the Commission on Postal Service*, 1977; and the prior writing of some U.S. Postal Service witnesses.

With the above background material and my knowledge of regulatory economics and practices, I have formed my opinions concerning the matters before this commission in this proceeding.

12. Q. WILL YOU PLEASE REVIEW THE IMPORTANT ECONOMIC FINDINGS OF THE NAGCP I COURT OF APPEALS' DECISION AND RELATE [R. 9411] THOSE FINDINGS TO YOUR ALREADY EXPRESSED VIEWS CONCERNING THE PRICING OF REGULATED SERVICES.

A. At the outset let me state that as to matters of economic theory and principles I have found that postal regulation of the last decade has been surprisingly rich in content. I say this relative to other regulated industries with which I have had considerable experience: electricity, natural gas, transportation and telecommunications. One often finds the dominance of the accountant and a hybrid of explanations in these other regulated industries.

In the NAGCP I Court of Appeals' decision several economic principles were addressed. I shall comment on each.

(i) The Court found that variable costs were a good start for basing prices on a cost causality principle. Most importantly, it also found that such cost attribution should be supplemented with further cost allocations, which, while not as precisely measurable, could be attributed with reasonable confidence.

My earlier discussion of common versus joint costs supports the Court's logic. It is more important to avoid the dual errors of: (1) presuming erroneously that all costs are perfectly joint and inseparable; [R. 9412] and, (2) placing that a disproportionate amount of revenue in a category that invites price discrimination. It is especially important that the court found that variable costs were a too narrow definition of causally related costs. To the economists it is perfectly clear that variable costs are a short run phenomenon. However, the effect of present consumption patterns undoubtedly places pressure on current and future facilities and resources which are fixed in the short run. A proper definition of cost causality or marginal costs includes such cost determining information.

(ii) The Court found that the use of value of service pricing and the inverse price elasticity rule which were used to assign 47.5 percent of the costs must be rejected. While not using the common versus joint cost distinction the Court also found that the Congress wanted most of these unattributed costs assigned by means of reasonable cost of service rules of thumb.

My criticism of the value of service, inverse price elasticity rule, and price discrimination nexus certainly suggests that I agree with the court's finding in this regard. In addition to my general criticisms of the inverse price elasticity rule, which I

outlined above, I add another one here to support the Court's [R. 9413] rejection of this concept in postal rate making. The inverse price elasticity rule is based theoretically upon a set of adjustments to marginal costs, which include all the foreseeable consequences of current consumption on total system costs. The adjustment is not meant to be applied to the far-more-narrowly-defined concept of short run variable costs. But this is precisely what the U.S. Postal Service attempted. In short, theoretical as well as empirical and logical flaws were present in the R74-1 utilization of what-the-traffic-will-bear demand factors.

(iii) The Court added demand considerations to six other statutorily (U.S.C. 3622(b)) mentioned considerations (subsequently an eighth was added) and suggested that after basing most cost allocation on the *required* cost causation criteria (U.S.C. 3622(b)(3)), any remaining institutional costs could be allocated using judgment.

The Court was quite correct in emphasizing the subjective nature of this last step in regulatory proceeding and therefore requiring that it be "severely" limited.

(iv) The Court gave quite rave reviews to the work of the Chief Administrative Law Judge who allocated 98 percent of the transportation costs on the basis of cost causality. It further expressed [R. 9414] concern the Postal Rate Commission might have been dragging its feet in complying with the Congressionally mandated cost causation principle of postal pricing. However, the Court found that its basis for review was quite limited and let the Postal Rate Commission's tariffs stand.

It is only the last step that concerns me as an economist. I believe that tradition or precedent is easily established and subsequently breeds a response. For the Court to have made the empirical finding it did in NAGCP I and *not* to have remanded the Commission to make a specific numerical response at least within some reasonable limits has the tendency to create the impression that the Service and/or the Commission can act with virtual impunity if they find the right set of words. Two cautious notes should be added. First, I make these statements as an economist, who must confess he does not understand all the legal constraints imposed on and/or options available to the Court. Second, my concerns are for the possible signal of impunity which may have been sent, but it awaits further analysis to determine if it was received.

13. Q. WILL YOU SIMILARLY REVIEW THE ECONOMIC FINDINGS OF THE NAGCP III COURT OF APPEALS' DECISION?

A. Yes. However, two things should be noted. First, [R. 9415] both the Court of Appeals' decision and R77-1 are best jointly reviewed. I shall attempt this below. Second, some of the economic logic of both the Court and the Commission in this latter rate case are more disturbing than the ones reached in NAGCP I. I will describe my concerns presently, but begin with what I find positive in NAGCP III.

(i) In NAGCP III the Court reaffirms the preeminence of the cost causality principle or rate design. It calls USC 3622(b)(3) "crucial." The Postal Rate Commission, while complaining about NAGCP I, increased the attributable cost percentage from 52.5% in R74-1 to 65% in R77-1. The Court also indicated it expected additional progress in the use of and improvements in

measurement from the PRC in R80-1. However, the Court refrained from defining an appropriate methodology.

In my opinion each of the above mentioned aspects of NAGCP III and R77-1 were movements in an economically sound direction and/or contributed to improved regulation.

(ii) Let me now turn to what I believe to be questionable economic aspects of NAGCP III and R77-1. I have five areas of concern:

(a) The definition and use of marginal cost;

(b) The use of service related cost methodology;

[R. 9416] (c) The disallowance of the Citizens' Rate Mail (CRM);

(d) The backdoor acceptance of value of service/price elasticity pricing.

14. Q. WHAT ARE YOUR CONCERNS WITH RESPECT TO THE DEFINITION AND USE OF MARGINAL COST?

A. There are two serious problems found in both R77-1 and NAGCP III with respect to the definition of marginal cost. Taking R77-1 first, the PRC and/or its staff was quite confused. They grasped the mid-1970's debate over electricity pricing apparently as treating economic efficiency and marginal cost as synonymous. The next step in the chain was the PRC's belief that the inverse elasticity rule was required in order to achieve economic efficiency. I have already expressed most serious reservations about this last matter. I shall not repeat them here.

Suffice it to state the PRC erred twice. First, the inverse elasticity rule is not required, and generally

it is inappropriate and usually misapplied. Second, marginal cost pricing does not mean the same thing as economic efficiency.

Therefore, rejecting the ill-advised use of value of service pricing will not reduce economic efficiency, rather it will almost always increase it. Additionally, the value of service rejection in NAGCP I in my view [R. 9417] did not really mean that marginal cost pricing was rejected, as the PRC believed to be the case.

Ironically, to most economists the term marginal cost means the change in total system cost for various changes in the output of specific services. As such, the Court's prescription for cost causality pricing should have been read by the PRC as a mandate for, not a rejection of, marginal cost pricing.

The Court in NAGCP III did not err as badly as the R77-1 decision when it treated marginal cost. Its errors were more traditional and have been made by others. The Court adequately defined marginal cost. Its first error was the presumption that marginal cost pricing theory is inapplicable when free-market competitive assumptions are not present.

The Court also focused on the inverse elasticity/value of service adjustment to achieve total cost recovery. Finding this unacceptable as it did in NAGCP I the Court decided to discard marginal cost. This is incorrect for the same reasons that I just discussed with respect to R77-1.

Finally, the Court stated its belief that when marginal cost pricing was used to encourage maximum use of services or to ration scare energy resources it may be an appropriate regulatory tool. But the Court noted neither is a dominant or important objective for Postal [R. 9418] Service pricing. The

Court went on to state that the avoidance of price discrimination among the mail classes was the dominant objective. The Court was correct, but its concept of marginal cost is wanting.

Both examples used by the Court of when marginal cost may be acceptable are demand oriented. (Encouraging use and discouraging use.) These are not marginal cost concepts. They are the consequence of consumer demand reactions to prices. Marginal cost is simply a cost causation measurement. Demand adjustments are *not* involved in the definition or the concept.

Ironically, if the Court had accepted the fact that cost causation means marginal cost, then the congressionally directed avoidance of price discrimination, would have meant the Court's embracing marginal cost pricing. Secondly, tying prices to marginal cost (cost causation) would mean the elimination-of-price-discrimination purpose in establishing an independent Postal Service would be furthered. At the same time this would also be a step toward making the Postal Service a self-sustaining enterprise. This aspect of marginal cost pricing should have broad appeal to those who neither understand nor care about economic efficiency, or even price discrimination.

Finally, recall that, as I have already indicated, by applying the inverse elasticity adjustment to variable [R. 9419] costs the Postal Service and PRC did not even have theoretical virtue on their side.

15. Q. WHAT ARE YOUR CONCERNS WITH RESPECT TO THE SO-CALLED SERVICE RELATED COST METHODOLOGY?

A. They are numerous. R77-1 included 7.14% of the total costs on an "assigned" basis using what it called a Service Related Cost methodology. The justifica-

tion for using this approach was its alleged conformance with NAGCP I. Numerous objections were raised by the parties. The Court generally agreed with them. However, it accepted the PRC decision pending further analysis and future proceedings.

Let me state my general reactions before turning to specific matters.

(1) I read NAGCP I as requiring that cost causation is to be the primary principle of rate design. The PRC claims this cannot be fully accomplished. Therefore, it adopted a cost related simulation for a policy option that was not then nor is it now practiced. That policy simulation was reducing 6-day delivery to 3-day delivery. It deduced by analogy that the difference in cost of delivery could be used to assign costs based on the virtually nonexistent special avoidance of deferrability benefits to certain classes of service.

Such logic is similar to attempting to sell [R. 9420] drive-in movie tickets to the phantom of the opera house. They are neither related nor does the phantom exist.

The purpose of setting prices based upon cost causation is to signal consumer and supplier wants and costs to each other. This helps achieve economic efficiency and self-sustaining economic health. There is no economic logic nor common sense reason to support the allocation of costs if cost variations are not present because a hypothetical, rather than real world, policy option can be conveniently estimated. Accordingly, it is inappropriate to allocate costs on the basis of the difference between 3-day delivery versus 6-day delivery.

To use it as a proxy for another characteristic, namely handling-deferrability, is, to put it mildly, stretching matters. The evidence offered by several parties at the time indicated that there was a wide gap between the nominal deferral of mail handling and actual deferral. In other words the supposed cost causing act of handling deferral may not in fact be occurring. Using a proxy that represents more than 7 percent of total system costs (3-day versus 6-day delivery schedules) for a non-observed mail handling procedure is inane.

[R. 9421] In the current procedure, USPS witness Alenier (pp. 6358 and 6359) agrees with both my conclusions.

A final troublesome feature is related to the Service Related Cost method. It appears that this is a movement from economic rate making to accounting rate making. I believe this would be a bad step and the PRC should avoid it. NAGCP I required cost causality to be used. This is the key to economic rate making. Allocating costs by association, hypotheses and proxies is more akin to an accountant's approach to rate making. While NAGCP I told the PRC to try harder I do not believe it meant for it to switch from cost causality. If those mail handling deferrals do not take place, and may even be costly to accomplish if they did, it is questionable whether to reflect these nominal service differences in prices. Note further that some lower priority services, especially third class, are frequently the mailings which require the carrier to visit every mail drop nearly every day. Delivery costs in time and effort may even be greater for those services theoretically deferrable. In any case there is no basis for the use of a [R. 9422] proxy and the abandonment of cost causality principles.

(2) When an enterprise like the Postal Service has actual cost of service levels that vary by such factors as timing, delivery schedules, priorities of service processing, etc. it is insufficient merely to set relative prices to reflect such cost differences. An efficiently operated, cost conscious enterprise should give customers opportunities to shift use patterns and service requirements, if these can be adjusted by the customer, to permit both the enterprise and the customer to save money and avoid what are unnecessary costs for unwanted or not required service. This principle is the essence of cost causality or economic pricing.

To charge more of customers, who are granted a non-deferred service, without offering those same customers a deferred service option is economically inefficient even in those instances in which non-deferral were actually to add to costs. Rejecting the Citizens Rate Mail and adding service costs to first class mail is illogical and economically inefficient. Adding [R. 9423] service costs to non-preferential mail is similarly illogical. More will be said on this below, but disproportionately adding peak costs to certain services without providing an off-peak service feature is similarly inefficient.

(3) There is some bad precedent in the NAGCP III decision with respect to the Service Related Costing Method. The Court found the method and logic flawed. However, it also concluded it was non-arbitrary. Therefore, it permitted the PRC's method to stand.

In reaching its conclusion the Court permitted the PRC to use concepts like "need," and "level of service" versus cost causation. These are demand, i.e. value of service, concepts rather

than cost concepts. The Court agreed these matters were flawed bu not arbitrary.

What might that tell th Postal Service about future rate cases? Should similarly flawed but "not arbitrary" cost assignments, that are transparent exercises of "value of service" pricing, be expected in the future? This is a matter that concerns most parties in R80-1.

[R. 9424] This is a matter that the PRC must carefully review in this case, if further bad precedent and questionable discriminatory policy is to be avoided.

16. Q. YOU INDICATED THAT THE CITIZENS' RATE MAIL DISALLOWANCE WAS A MATTER OF CONCERN. WILL YOU EXPLAIN WHY THIS IS SO?

A. As I indicated above, cost causality implies that the enterprise can determine that particular uses or use patterns cause an increase in their cost. This might include labor costs, including shift differential costs, equipment costs, space utilization costs, transportation costs, etc.

Discovering such cost causation is only part of the story. The Congress intended the development of new services. The Congress also intended a predominantly self-sustaining Postal Service.

When cost causation is found, potential cost savings should be understood to have also been found. The way to achieve those cost savings is to offer new service options that can lower costs if taken. The enterprise should provide discounts to its customers who take such options based upon the expected cost savings. The philosophy behind the Citizens' Rate Mail was correct. That philosophy fortunately was

* * * *

[R. 9449] yet another proceeding to learn the out-

come of the rejected (or was it only put on the back burner?) Citizens' Rate Mail from R77-1.

22. Q. IN YOUR LAST ANSWER YOU RAISED A NUMBER OF CONCERNS ABOUT THE TREATMENT OF FIRST CLASS MAIL USERS. HAVE YOU DETERMINED THE EFFECTS OF TREATING EACH CLASS ALIKE WITH RESPECT TO REVENUE AND TO COST OF SERVICE MARK-UPS?

A. Yes, Table 4 uses the R77-1 and the proposed R80-1 Full Rates to show that: (a) First Class is disproportionately carrying the burden of the institutional or residual costs; (b) that this burden is increasing in R80-1.

Also shown are what would happen to revenue if the burden of the cost mark-up was levelized across classes. In R80-1 this would shift about $800 million in revenue requirements from First Class mail users. This would make it possible to reduce the proposed 20¢ first class rate by about 1.6¢.

Even if the mark-ups were equalized across services, I would still be troubled by the incredibly large proportion of costs that were left unattributed for the postal system (about 40%). From the theoretical and other arguments presented above this is an unacceptable percentage.

[R. 9451] It is true that various services share the use of common facilities and resources. However, these are not perfectly joint in the cost sense. Cost causality can be measured. Others have shown marginal cost can be determined. A correct definition and use of this term should find its way back into PRC proceedings R80-1. At the same time it is necessary to avoid the confusion between marginal cost and the inverse price elasticity rule, which should continue to be rejected.

[R. 9450]

TABLE 4

SUMMARY OF ESTIMATED TEST YEAR FINANCES
(Dollars in thousands)

Docket No. R77-1 Full Rates*

					Levelized Class Contributions		
	Attributable/ Assignable Costs	Revenues	% of Costs	Revenue Contributions to Other Costs	Revenues	% of Costs	Revenue Contributions to Other Costs
First Class Mail	8,241,290	10,495,474	127.35	2,254,184	10,296,667	124.94	2,055,377
Second Class Mail	588,088	721,536	122.69	133,448	734,757	124.94	146,669
Third Class Mail	2,321,859	2,778,102	119.65	456,243	2,900,931	124.94	579,072
Fourth Class Mail	663,268	791,621	119.35	128,353	828,687	124.94	165,419
Average			124.94			124.94	

SUMMARY OF ESTIMATED TEST YEAR FINANCES
(Dollars in thousands)

Proposed Full Rates**

					Levelized Class Contributions		
	Attributable/ Assignable Costs	Revenues	% of Costs	Revenue Contributions to Other Costs	Revenues	% of Costs	Revenue Contributions to Other Costs
First Class Mail.....	7,722,197	12,996,621	168.30	5,274,424	12,205,704	158.06	4,483,507
Second Class Mail.....	796,589	993,131	124.67	196,542	1,259,088	158.06	462,499
Third Class Mail	1,933,002	2,888,707	149.44	955,705	3,055,302	158.06	1,122,300
Fourth Class Mail.....	663,367	819,425	123.53	156,058	1,048,518	158.06	385,151
Average.....			158.06				

CHARLES J. CICCHETTI

PROFESSIONAL EXPERIENCE

BA	Colorado College, Economics, 1965
Ph.D.	Rutgers University, Economics, 1969
1968-1969	Instructor, Rutgers College
1969-1972	Resources for the Future, Washington, D.C.
1972	Associate Lecturer, School of Natural Resources of the University of Michigan
1972-1974	Visiting Associate Professor, Economics and Environmental Studies, University of Wisconsin/Madison
1974-Present	Professor, Economics and Environmental Studies, University of Wisconsin/Madison
1975-1976	Director, Wisconsin Office of Emergency Energy Assistance Special Energy Counselor for Governor Patrick J. Lucey, State of Wisconsin
1977-1979	Chairman, Public Service Commission of Wisconsin Appointed by Governor Patrick J. Lucey
Until March 1980	Commissioner, Public Service Commission of Wisconsin

ORGANIZATIONS

American Economic Association

EDITORIAL BOARDS

Journal of Environmental Economics and Management
Energy Systems and Policy
Land Economics, Former Coeditor

ADVISORY BOARDS

National Association of Regulatory Utility Commissioners, Executive Committee and Chair of the Ad Hoc Committee on the National Energy Act
Public Interest Economics Center: Board of Directors
National Council for the Public Assessment of Technology
Center for Public Policy Advisory Committee, Board Member
Department of Energy, Fuel Oil Marketing Advisory Committee & Sub-Committee
Association of Environmental and Resource Economics, Executive Committee

[R. 9453] PUBLICATIONS

BOOKS

The Demand and Supply of Outdoor Recreation, with J. J. Seneca and P. Davidson, New Brunswick: Rutgers University, 1969. Also, Washington, D.C.: U.S. Department of Interior, 1969.

Alaskan Oil: An Economic and Environmental Analysis of Alternative Routes and Markets, for Resources for the Future, Baltimore: Johns Hopkins Press, December, 1972.

Forecasting Recreation in the United States, Boston: Lexington Books, D.C., Heath and Co., June, 1973.

A Primer for Environmental Preservation, New York: MSS Modular Publication, 1973

Perspective on Power, with E. Berlin and W. Gillen for the Ford Foundation Energy Policy Project, Boston: Ballinger Books, 1974.

Studies in Electric Utility Regulation, ed. with J. Jurewitz, for the Ford Foundation Energy Policy Project, Boston: Ballinger Books, 1975.

Energy System Forecasting, Planning and Pricing, ed. with W. Foell for the National Science Foundation, Madison: University of Wisconsin Monograph, 1975.

The Measurement of Congestion Costs: A Case Study of the Spanish Peaks Primitive Area, with V.K. Smith, Boston: Ballinger Books, 1976.

The Marginal Cost and Pricing of Electricity: An Applied Approach, with W. Gillen and P. Smolensky, Boston: Ballinger Books, 1977.

JOURNAL ARTICLES

"A Gravity Model Analysis of the Demand for Public Communication," with J. J. Seneca, *Journal of Regional Science*, Winter, 1969.

"Some Economic Issues Involved in Planning Urban Recreation Facilities," *Land Economics*, Winter, 1970.

"A Note on Jointly Supplied Mixed Goods," with V. K. Smith, *Quarterly Review of Economics and Business*, Fall, 1970. (Comment, Winter 1973).

"Option Demand and Consumer Surplus-Further Comment," with A. M. Freeman III, *Quarterly Journal of Economics*, Vol. LXXXV, August, 1971.

"On the Economics of Mass Demonstrations," with A. M. Freeman, R. H. Haveman and J. L. Knetsch, *American Economic Review*, Vo. LXI, No. 4, September, 1971.

"The Identification Problem: A Clarification for Recreation Studies," with V. K. Smith, J. L. Knetsch and R. Patton, *Water Resources Research*, Summer, 1972.

[R. 9454] "The Economics of Environmental Preservation: A Theoretical and Empirical Analysis," with A. C. Fisher and J. V. Krutilla, *American Economic Review*, September, 1972.

"Evaluating Benefits of Environmental Resources with Special Application to the Hells Canyon," with J. V. Krutilla, *Natural Resources Journal*, Vol. 12, No. 1, January, 1972. (Also published in *Benefit-Cost Analysis*)

"Congestion, Quality Deterioration and Optimal Use: Wilderness Recreation in the Spanish Peaks Primitive Area," with

V. K. Smith, *Social Science Research*, March, 1973. (Also RFF Reprint).

"The Mandatory Oil Import Quota Program," with W. Gillen, *Natural Resources Journal*, Vol. 13, No. 3, July, 1973.

"Evaluating Federal Water Projects: A Critique of Proposed Standards," with R. K. Davis, S. H. Hanke, and R. H. Haveman, *Science*, Vol. 181, August, 1973.

"Economic Models and Recreation Planning," with A. C. Fisher and V. K. Smith, *Operations Research*, September/October, 1973.

"Interdependent Consumer Decisions: A Production Function Approach," with V. K. Smith, *Australian Economic Papers*, December, 1973.

"Electricity Pricing: Critical Crossroads to New Group Participation Sport," *Public Utilities Fortnightly*, August, 1974. (Also in *Aware*).

"Reflections on Irreversibility in Economic Process and a Reply to Comments on "The Economics of Environmental Preservation," with J. V. Krutilla and A. C. Fisher, *American Economic Review*, 1974.

"An Economic Analysis of Water Resource Investments and Regional Economic Growth," with V. K. Smith and J. Carson, *Water Resources Research*, 1975.

"A Note on Fitting Log-Linear Regressions with some Zero Observations for the Regressand," with V. K. Smith, *Metroeconomica*, 1975.

"The Design of Electricity Tariffs," *Public Utility Fortnightly*, August, 1975.

"Alternative Price Measures and the Residential Demand for Electricity: A Specification Analysis," with V. K. Smith, *Regional Science and Urban Economics*, 1975.

"An Econometric Evaluation of a Generalized Consumer Surplus Measure: The Mineral King Controversy," with V. K. Smith and A. C. Fisher, *Econometrica*, 1976.

"Energy Regulation: When Federal and State Regulatory Commissions Meet" with J. William *American University Law Review*, Forthcoming, 1978.

"The End-User Pricing of Natural Gas", with Don Wiener, *Public Utility Fortnightly*. March 16, 1978.

[R. 9455] ARTICLES APPEARING IN OTHER VOLUMES

"Observations on the Economics of Irreplaceable Assets," with J. V. Krutilla, A. M. Freeman and C. Russell, in *Environmental Quality Analysis*, ed. by A. Kneese and B. T. Bower, Baltimore: Johns Hopkins Press, 1972.

"An Economic Description of a Two Good World When One Good is Non-Producible," in *Natural Environments: Studies in Applied Environmental Analysis*, ed. by J. V. Krutilla, Baltimore: Johns Hopkins Press, 1972.

"Outdoor Recreation and Congestion in the United States," in *Population, Resources and the Environment*, ed. by R. Ridker. Washington, D.C.: U.S. Government Printing Office, 1972.

"Benefits or Costs" in *Benefit Cost and Policy Analysis*—1972 ed., W. Nishkanen, *et al.* Chicago: Aldine Press, 1972.

"The Trans-Alaska Pipeline: An Economic Analysis of Alternatives," with A. M. Freeman III, in *Economics and the Environment*, ed. by A. C. Enthoven and A. M. Freeman III, 1973.

"An Economic Analysis of the Trans Alaska Pipeline," *Benefit Cost and Policy Analysis*, 1973, ed. R. Haveman, et al, Chicago: Aldine Press, 1974. (Originally presented at American Association for the Advancement of Science 1972 meetings).

"Economics and the Growth of Electricity Use," with W. Gillen; in *Energy: Demand, Conservation and Institutional Problems*, ed. M. Makrakis, Cambridge, Massachusetts: MIT Press, 1974.

"Some Institutional and Conceptual Thoughts on the Measurement of Indirect and Intangible Benefits and Costs," in *Benefit Cost Analysis and Water Pollution Control Policy*, ed. H. Peskin and E. Seskin, Washington, D.C.: Urban Institute, 1974.

"Congestion, Optimal Use and Benefit Estimation: A Case Study of Wilderness Recreation," with V. Kerry Smith in *Social Experiments and Sociai Program Evaluation*, Ed. J. G. Albert and M. Kamrass, Cambridge, Massachusetts: Ballinger Publishing Co., 1974.

"Public Utility Pricing: A Synthesis of Marginal Cost, Regulatory Constraints, Averch-Johnson Bias, and Peak Load Pricing," with J. Jurewitz, in *Studies in Electric Utility Regulation*, ed. by C. Cicchetti an J. Jurewitz, Boston: Ballinger Press, 1975.

"Measuring the Price Elasticity of Demand for Electric Power: The U.S. Experience" with V. Kerry Smith in *Energy System Forecasting, Planning and Pricing*, ed. C. J. Cicchetti and W. Foell, Madison: University of Wisconsin Press, 1975.

"Implementing Diurnal Pricing for Electricity: A Pragmatic Approach" in *Energy System Forecasting, Planning and Pricing*, ed. C. J. Cicchetti and W. Foell, Madison: University of Wisconsin Press, 1975.

"The Measurement of Individual Congestion Costs: An Econometric Application to Wilderness Recreation," with V. K. Smith in *Theory and Measurement of Economic Externalities*, Academic Press, 1975.

[R. 9456] LESS TECHNICAL ARTICLES

"User Response in Outdoor Recreation: A Production Analysis," with J. J. Seneca, *Journal of Leisure Research*, Summer, 1969.

"User Response in Outdoor Recreation: A Reply," with J. J. Seneca, *Journal of Leisure Research*, Spring, 1970.

"How the War in Indochina is Being Paid for by the American Public: An Economic Comparison of the Periods Before and After Escalation," Public Forum, July, 1970, reprinted in the *Congressional Record*, August 13, 1970.

"A Review of the Empirical Analyses That Have Been Based Upon the National Recreation Surveys," *Journal of Leisure Research*, Spring, 1972.

"The Wrong Route," *Environment*. Vol. 15, No. 5, June, 1973.

"Benefit-Cost Analysis and Technologically Induced Relative Price Changes: The Case of Environmental Irreversibilities," with J.V. Krutilla, *Joint* Economic Committee, 1973. (Similar to 1972 *NRJ* Article).

"The Mandatory Oil Import Quota Program: A Consideration of Economic Efficiency and Equity" with W. Gillen, *Joint Economic Committee of the Congress*, 1974. (Similar to 1973 *NRJ* Article).

"The Political Economy of the Energy Crisis" with R. Haveman, in *Carrol Business Review*, 1974.

"Nixon-Ford National Policy Plans: A Critique," *Transportation Journal*, Fall, 1976. (Presented at Annual Meeting of American Economic Association, Atlantic City, New Jersey, September, 1976).

"It's still the Wrong Route", *Environment*, November, 1976.

PAPERS PRESENTED AT NATIONAL AND INTERNATIONAL MEETINGS

"Preservation Versus Development: Some Economic Issues," with J. V. Krutilla. Presented at the December, 1970 meetings of the *Economic Society*.

"Optimality in Producing and Distributing Public Output," with R. H. Haveman. Presented at the Winter, 1971 meetings

of the *American Economic Association and Public Choice Society.*

"Regression Analysis with Dichotomous Dependent Variables," with VA K. Smith. Presented at the 1972 *Econometric Society Meetings* (December, Toronto).

"Some Economic Implications of the National Environmental Policy Act." *Public Choice* Meetings, College Park, Maryland, 1973, and similar paper at the *American Bar Association Annual Meeting*, 1973 in Washington, D.C.

"Electricity Pricing: Critical Crossroads or New Group Participation Sport" at the *Ames Public Utility Conference and the Midwest Association of Regulated Utility Conference*, both 1974.

[R. 9457] "Implementing Diurnal Pricing: A Pragmatic Approach" *Regulatory Information Systems Conference*, St. Louis, Missouri, 1974.

"Benefit Cost Analysis and the National Environmental Policy Act." *Proceedings of the American Bar Association*, 1975.

"Implementing Time-of-Day Pricing of Electricity: Promises and Pitfalls," Atlanta, Georgia, March, 1975.

"The Energy Game: Who are the Players?" Presented to the *49th Annual Convention and Trade Exhibit of the Wisconsin Petroleum Association.* Milwaukee, Wisconsin, April, 1975.

"Prepared remarks presented before the *Institute of Public Utilities*, Michigan State University, East Lansing, Michigan, May, 1975.

"Implementing Time-of-Day Pricing of Electricity: Promises and Pitfalls," Addressed to membership of the *Wisconsin State Association of the National Association of Power Engineers* at the Annual State Meeting, Madison, WI. May, 1976.

"New Approaches to Public Utility Rate Setting," *Consumer Conference, Third* National seminar for Consumer Representatives in State and Local Government, Milwaukee, Wisconsin, July, 1975.

"The Design of Electricity Tariffs," *Upper Great Lakes Utilities Commission*, Greenbrier, West Virginia, July, 1975.

"Energy Pricing: The Growing Consumer Burden," *Third National Seminar for Consumer Representatives in State and Local Governments*, Milwaukee, Wiconsin, July, 1975.

"Time of Day Pricing: WHY and HOW," Conference held jointly by the Federal Energy Adminstration, Amercian Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners and the National Rural Electric Cooperatives Association, Washington, D.C., June, 1975.

"Public Utility Pricing, Conservation, and Ecology," *NARUC Annual Regulatory Studies Program*, Michigan State University, East Lansing, Michigan, August, 1975.

Prepared Remarks before the *Joint Economic Committee of the Congress* of the U.S. as requested by Hubert Humphrey, Chicago, Illinois, October, 1975.

"Electrical Sector: Rate Performance," *State Energy Conference*, Denver, Colorado, November, 1975.

"The Marginal Cost of Electricity and Continuing Rate Controversies," *1975 Symposium on Rate Design Problems of Regulated Industries*, Kansas City, Missouri, February, 1976.

"Excerpt form the Marginal Cost and Pricing of Electricity: An Applied Approach," *NARUC Annual Regulatory Studies Program*, Michigan State University, East Lansing, Michigan, August, 1976.

[R. 9458] "Nixon-Ford National Policy Plans: A Critique," *Annual Meeting of American Economic Association*, Atlantic City, New Jersey, September, 1976.

Prepared Summary of NSF Study to Provide a Practical Guide for the Analysis of the Marginal Cost Structure of Electric Utilities for the Purpose of Designing Electricity Tariffs, at Rann II Symposium, Washington, D.C. November, 1976.

International Institute for Applied Systems Analysis (IIASA), Vienna, Austria, 1976.

Prepared Remarks "Non-Waste Technology & Production", Cost/Benefit Analysis Techniques in Identifying and Implementing Non-Waste Technologies, NWT Seminar, Paris, France December, 1976.

"Alaskan Oil and Gas: The Wrong Route Revisited", American Association for the Advancement of Science, Denver, Colorado, February, 1977.

"Our Energy Crisis and Education: A Critical Assessment", *Council for Education Development and Research Conference* on Education Confronts the Energy Crisis (CEDAR), Washington, D.C., June, 1977.

"Energy: To Regulate or Not to Regulate", *Wisconsin Energy Coalition Energy Conference* Milwaukee, Wisconsin, October, 1977.

"Time of Use Electricity Pricing: Correcting Some Continuing Confusion" with William Gillen, *National Association of Regulatory Utility Commissioners* (NARUC), New Orleans, LA., November, 1977.

[R. 9459] PUBLIC TESTIMONY (PREPARED WRITTEN STATEMENTS)

Joint Economic Committee
Trans Alaska Pipeline
Mandatory Oil Import Quotas
Hell's Canyon
Energy Policy
Electricity Pricing

Senate and House Interior Committees
Trans Alaska Pipeline
Energy Conservation and Pricing
Optimum Transportation System for Alaskan Natural Gas, March, 1976

Senate Commerce Committee
Natural Gas De-Regulation

Subcommittee on Energy and Power of the U.S. House of Representatives
Interstate and Forcign Commerce
Energy and Power
Electric Utility Reform, March, 1976
Synthetic Fuel Loans, May, 1976

Department of the Interior
Trans Alaska Pipeline

Federal Power Commission
Hell's Canyon
El Paso Natural Gas Coal Gasification
El Paso Natural Gas Pricing
Alaskan Natural Gas, March, 1976
Natural Gas Pricing, March, 1976

Wisconsin Public Service Commission
Electric Rate Stuctures
Price Elasticity of Demand for Electricity
Application of WEPC for Authority to Construct and Place in Operation a Coal Fired Power Plant and Related Facilities in the Town of Pleasant Prairie Kenosha County and Certain Related Transmission and Substation Additions CA-5489, June, 1976

[R.9460] New York and New Jersey Environmental Protection Agencies Tocks Island Dam

Maryland, New York, Michigan, New Jersey, Arkansas, Maine, California, Florida, Rhode Island, Minnesota Public Utility Commission and Atomic Energy Commission, Connecticut, Massachusetts, Missouri, Nevada, New Hampshire, Vermont, Virginia, Wisconsin,
Peak Load Pricing of Electricity

Energy Council of the Federal Government
Critique of the Project Independence Report
Critique of Oil and Natural Gas Policy

Federal Energy Administration
"Rate Design and its Relationship to Load Management," June, 1975.
"Allocation of Canadian Crude Oil," December, 1975.
"Modification or Termination of the State Set-Aside Program," 1975.
"Establish Energy Administration to Establish Mandatory Allocation of Canadian Crude Oil," December, 1975.
"Amendments to Entitlements Program," February, 1976.
"Third Stage of EPCA: Additional Incentives," June, 1976.
"Analysis and Recommendations of Northern Tier Pipeline Proposals," July, 1976.
"The effects of Middle Distillate Decontrol on the American Consumer: A Critique of the Decontrol Monitoring and Price Index Actions of the FEA with Michael McNamara and Rod Shaughnessy, Washington, D.C. August, 1977.

Wisconsin State Legislature
Testimony on the Govenor's Transportation Program, before the Senate Committee on Commerce, Joint Committee on Highways, 1975.
Testimony
Environmental Quality Commission, January, 1976.

Subcommitee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources
Utility Rate Reform, July, 1977.

House Ways and Means Committee, Washington, D.C.
Utility Tax Reform, March 8, 1978.

[R. 9461] Comments on the U.S. Department of Interior Study: Alaskan Natural Gas Transportation Systems, October 29, 1975

Comments on Federal Power Commission Proposed Rulemaking RM 75-19 on End Use Rate Schedules, May 30, 1975

Prepared Remarks "The Time Has Come to Speak Out on our Energy and Economic Crisis," Madison, Wisconsin, March, 1975

Remarks Before the Wisconsin Manufacturing Association in Stevens Point, Wisconsin, September, 1975.

Remarks Before the Amercian Association for the Advancement of Science at the Minnesota Energy Agency Conference, 1975

"Energy Pricing in the United States: A Critique," 1975

"H.R. 12461, Summary of Major Provisions of Electric Utility Rate Reform and Regulatory Improvement Act (formerly H.R. 10100), March, 1976

Remarks before the 1976 Symposium on Rate Design Problems of Regulated Industries, "The Marginal Cost of Electricity and Continuing Rate Controversies," Kansas City, Missouri, February, 1976

Prepared Remarks "Excerpt from the Marginal Cost and Pricing of Electricity: An Applied Approach, before the NARUC Annual Regulatory Studies Program, East Lansing, Michigan, August, 1976

"Nixon-Ford National Policy Plans: A Critique," Before the Annual Meeting of American Economic Association, Atlantic City, New Jersey, September, 1976

Comments "Metering Experiments", at Advest Seminar, New York, New York October, 1976

Prepared Remarks of NSF Study to Provide a Practical Guide for the Analysis of the Marginal Cost Structure of Electric Utilities for the Purpose of Designing Electricity Tariffs, at Rann II Symposium, Washington, D.C. November, 1976.

Prepared Remarks "Non-Waste Technology & Production", presented at the NWT Seminar Seminar, on the Principles and Creation of Non-Waste Technology & Production, Paris, France, November, 1976.

"Alaskan Oil and Gas: The Wrong Route Revisited", American Association for the Advancement of Science, Denver, Colorado, February, 1977.

"Alaskan Natural Gas", Statement before the Council on Environmental Quality, Washington, D.C., May, 1977.

[R. 9553] Response of Witness Cicchetti to R.D. Int. No. 3

Witness: Charles J. Cicchetti
(Cross)

3. On page 15 of your testimony you state that certain "difficult matters" (e.g., price dicrimination) "can be circumscribed, if instead of attempting to measure the *causes* of the costs of services, we are willing to accept a different standard."

(a) Are you suggesting that fully distributed costing (FDC) is that "different standard?" If not, please explain your testimony in the first full paragraph on page 15.

(b) Assuming your "different standard" is FDC, are you suggesting that standard be applied to those costs which cannot be separately attributed in a casual sense? Please explain any "no" answer.

(c) With reference to the same testimony on page 15, you stated that "using factors like weight, volume, time utilization, etc., the accountants will distribute all the required *revenue*." (Emphasis added.) You then proceed to refer to "allocation of *costs*." (Emphasis added.) By the use of the underscored terms interchangeably, are you suggesting that the distribution of *revenue* would follow the distribution of *costs* on the basis of factors such as weight, volume, etc.? Please explain.

(d) In view of your admission that such allocations "will not always follow cost causality," please explain your suggested reliance on these factors for cost and/or revenue distribution in view of your repeated emphasis on the neccessity to rely on cost causality exclusively for regulatory pricing. (See, for example, the quoted portions of your testimony in interrogatory no. 1.)

(a) Yes

(b) Pratically speaking, yes

(c) No. This conclusion proceeds too quickly and takes my principal thoughts out of context. First, as a matter or first principle prices (i.e., revenue) should be based on marginal

costs (properly defined and estimated as described in my testimony). Overall revenue requirements set the level of prices. If there is a gap pragmatic [R. 9554] decisions have to be made. If formulae or proxies are to be used I prefer those that can be objectively measured, and which are simple proxies of cost causality, rather than misleading, but elegant, expressions of value or service.

(d) Some costs cannot be untangled. These are called "joint" costs. These can be ignored if prices based on cost causality produce too much or just the correct level of required revenue. If there is a revenue shortfall other factors must be used. I prefer objective measures which are related to cost causality by weight, volume, time utilization, etc. to be used rather than to rely on purely subjective judgement. I should point out that I put value of service in this latter category.

* * * *

[R. 9567] BY MR. MAY:

Q. Dr. Cicchetti, does your testimony include any specific rates which you suggest to the Commission as substitutes for the specific rates proposed by the post office?

A. No it does not.

Q. Are you familiar with Dr. Moshman's filed testimony in this proceeding?

A. In a general way, yes.

Q. Would you agree that his testimony suggests a method for distributing institutional costs, but does not propose specific rate recommendations?

A. I believe that is correct, but I am not a hundred percent certain.

Q. Would you also agree that Mr. Abraham, if you are familiar with his testimony, the other NAGCP witness, does not propose specific rate recommendations since his testimony is directed toward providing an alternative allocation of transportation costs?

A. Yes, that is certainly my understanding.

Q. In summary then, is it not true that NAGCP, or at least that no NAGCP witness has proposed specific rates to this Commission?

A. That is correct.

Q. With regard to the definitive recommendations in [R. 9568] your own testimony would it be correct to summarize them as making a case for marginal costing and the application of levelized markups to distribute institutional costs?

A. The first is certainly true. My second is to indicate the effect of a levelized markup but not necessarily to endorse it from the standpoint of economics.

There are economic reasons why a levelized markup might make some sense, but they are not to me as unambiguously compelling as the case that can be made for marginal costs or cost-related pricing.

Q. Well, but my question was framed in terms of what your testimony suggests to the Commission, once you have exhausted marginal costs to the extent you can, and are left only with institutional costs.

Is it your recommendation to this Commission that having done that you use levelized markups to distribute institutional costs?

A. It is a starting point. I wouldn't necessarily—and I make that in part as an economist, and in part as, say, a student of regulation. But I can't make that argument—I can't make that recommendation in all honesty as unrestricted as I can make the argument for marginal costs. If you are asking me to say yes or no, it would be yes, but not a strong yes as my answer to the marginal cost part of your question.

[R. 9569] Q. Well, in the real world, and in the absence of something better, I take it that is your recommendation to this Commission, whether you do so in a capacity as a regulatory

realist or as economist or merely as a human being. Is that or is that not your recommendation to this Commission?

A. As a starting point.

Q. Well, what is your finishing point?

A. The Commission has to consider the other factors that reasonable people would consider in reaching conclusions, such as whether or not, for example, you can have First Class mail service with decimals in it or whether they have to be whole numbers.

One has to consider the role one is going to attribute to price elasticity in setting the final rates for each category of customers.

There are a number of factors that I wouldn't begin to try to tell each Commissioner how they should weigh, but which I think it is fairly obvious to them, and in fact to the Congress in writing the legislation, that this Commission should consider.

I view my job as an expert as requiring me to articulate some principles, to defend those principles that should be considered, but I don't believe that rate setting and tariff setting is some scientific device that [R. 9570] you can just push some buttons in a black box and out will pop all the answers. I think judgment still has to be applied.

I would start the application of judgment by looking at a levelized markup, and where that would end up would be entirely the judgment of the Commission.

Q. Would you turn to your answer to Reader's Digest Interrogatory 3-D.

You there acknowledge, do you not, that "Some costs cannot be untangled".

Is it correct that these are the costs which you state are joint costs or institutional costs?

A. Yes, that is the precise definition of the term joint costs.

Q. With regard to your suggested use of "objective measures", which related to cost causality by weight, volume, time utilization, et cetera, is it correct that you would employ these factors only with regard to the measurement of marginal costs in order to achieve a more complete cost allocation than the Postal Service has presented?

A. No.

Q. Well, alternatively are you suggesting that while Dr. Moshman's approach of allocating all institutional costs on the basis of pieces and weight may be used, there [R. 9571] is choice to be made with regard to institutional cost allocation based on judgment?

A. There is a step in there that I am not prepared to make without some explanation.

Some costs, some residual costs, some overhead costs, certainly I think invite the use of judgment. But I would apply an objective standard, particularly if the percentage of costs that can be measured or attributed is as low as it is in this particular docket. I would suggest to this Commission that they should be using more objective measures for the percentage of overhead costs that are claimed in this proceeding before they apply their subjective judgment.

In other words, I would go as far as I could with the application of cost causality principles. If the percentage of costs that were being attributed on that basis was judged to be small, and I think in this case, I certainly reading in comparison with previous cases, judge it to be small, I would then suggest the Commission use these objective standards of accounting, and then finally after it looked at a levelized markup for the overhead costs that are still remaining to then apply the judgment that it feels it has to apply to the other standards that are to be considered by it in reaching its final conclusions.

[R. 9572] Q. Well, you are assuming then that you can use these "objective accounting standards", pieces, weight, volume, what have you, to measure cost causality, is that correct?

A. No. I am saying just the opposite. I would start with cost causality and go as far as I could with that.

Then if it was a question of not being able to have data, the time, or the ability to measure additional costs which are reasonably expected to be based upon cost causality—I just don't know how to do it but I think that there are other cost causal elements in the system. Then I would use the objective standards of accounting, recognizing that the engineering ecnomics, either the capability or the ability to use engineering economics does not quite take me far enough.

I would then invoke the use of accounting standards.

And finally for that portion of costs which are judged to be joint and untangible I would then apply the other notions that I would—I would use the phrase "subjective judgment".

What I am suggesting to you is that I would put an interim step between the first thing you are asking me about and the second thing you are asking me about. And [R. 9573] that interim step is where I would apply some of the notions of accounting to add on to the notions of engineering economics.

Q. Yes, but then to allocate joint or institutional costs you would not use accounting principles?

A. I would not. And I would never use accounting principles, for example, if the percentage of unallocable costs, overhead, joint costs, or what have you, was let's say roughly 20 percent or less. When it is as large as it is, that is when I would suggest this Commission has no choice but to enter into the objective measures of accounting, because economics either as a discipline or in its application in this case has failed to do enough attributing of causally related costs.

Q. Just to be clear, this interim procedure you are talking about, before you get to the noncost factors of the act, but the interim procedure you are assuming necessarily, are you not, that in this case the Postal Service has not discovered all causally related costs?

A. Yes, that is correct.

Q. And therefore there is some portion unknown to you of costs that are causally related, and that you would then use these "objective accounting principles" to distribute that portion of the cost, is that correct?

A. That is a much better way of saying what I am [R. 9574] trying to say. The answer is yes.

Q. And that you also believe that by using these "objective accounting standards" to distribute that portion of the cost that you are somehow in effect approximating a placement of those costs on the pieces of mail that cause them, is that correct?

A. Yes.

Q. Now let me turn back to your testimony as to what it is you are recommending this Commission do for the remainder of those costs those which in your answer to Reader's Digest Interrogatory 8 you said could be allocated, again using accounting principles but then if you did it you would only be doing it for noncost purposes, for example, equity. That is your answer to Reader's Digest Interrogatory 8, is it not?

A. Equity would be one of those factors. It may not be the only one, but it would be where I would start in the application of those other factors.

Q. And I believe you also said when you use it in that context it is a matter of judgment?

A. That is correct.

Q. Do you, or can you say whether you favor Dr. Moshman's approach to distribute institutional costs, or joint costs, or whether you prefer your approach of levelized markups?

[R. 9575] A. As I tried to say in my testimony, I believe—not only did I use the word "judgment" I said "purely subjective judgment". And what I mean by that is that the Commission as the decision making body that has to apply this purely subjective judgment, should look at different standards, levelized would be one, pieces and volume or a combina-

tion of them might be several others. And I think all these factors of these multiple standards create a reasonable range for decision making, and if the Postal Rate Commission is to use standards like the standards applied in other public utility regulation it would be proper and appropriate for the Commission to look at several of these approaches, none of which I can identify as something that, as an economist or even as a former regulator that I can say unambiguously is the best, but all of which I can say present information of value in helping the decision makers, in this case the Postal Rate Commission, to reach its conclusions.

And in my testimony, even though I have given a mathematical example of the levelized rate of return, or excuse me, levelized markup, it is there more for illustrative purposes than because I personally endorse it as the best answer.

It is one of the factors, along with the kinds of calculation that Witness Moshman has done that I think the [R. 9576] Commission should use in reaching its final conclusion. And if it sounds like I am mushy on it it is because I am. Because I don't think there is a precise answer to allocating joint or overhead costs. It is a matter of judgment.

Q. Well, perhaps we can say you are mushy on Moshman, is that right, Doctor?

A. I wouldn't mind saying it.

Q. But is it because you are so diferentially shy that you are unwilling to tell us whether you prefer your approach or Dr. Moshman's approach?

A. That is certainly correct.

Q. I am going to show you Dr. Moshman's answer to Reader's Digest Interrogatory No. 1. If you don't have one I can give you a copy of it.

A. I have never seen it.

A. This has not been introduced in evidence, so I am simply identifying it for the record. It will, however, be offered.

Would you read his answer to Interrogatory No. 1?

A. Just the answer?

Q. Well, read the question and the answer, unless you can intu the question from the answer.

A. The question is "On pages four and five of your testimony you state that one of your purposes is to" [R. 9577] "demonstrate an alternative method of distributing institutional costs. Is it the purpose of this demonstration merely to present an exercise in applying institutional cost distribution factors or is it the purpose of the demonstration to provide specific rate recommendations as shown in the first full paragraph of your testimony on page 13. Please explain fully".

The answer is: "The purpose of the demonstration of an alternative method of allocating institutional cost was to illustrate the feasibility of the procedures and to portray the results obtained from an application of this objective method based on realistic cost accounting assumptions. It was not my intention to provide specific rate recommendations".

Q. Now, Dr. Moshman states there, does he not, that his method of allocating institutional costs is based on "realistic cost accounting assumptions", correct?

A. That is correct.

Q. Is there not a basic inconsistency, Doctor, between your testimony and Dr. Moshman's testimony with regard to whether the allocation of institutional costs—institutional costs—on the basis of pieces and/or weight, is an exercise in measuring cost causality?

A. I don't think so. In fact maybe I am having a difficult time this morning explaining myself, but I was [R. 9578] about to say as you were walking back to your seat that that part of Moshman I am certainly not mushy on because I agree with him. I think we are both saying the same thing, and that is that neither of us are proposing to the Commission that we know how to allocate institutional costs or overhead costs. What we

are suggesting to the Commission is that they look at these different accounting cost allocation methods, understand the effect of the different methods before they reach their final decision in this whole matter of applying subjective judgment that we are both I believe we are admitting they are going to have to apply.

Q. You have testified that when it comes to distributing institutional costs that a use of pieces and/or weight, that is accounting principles, will not track cost causality. That is your testimony, unless it does so by accident, is that not the case?

A. That is right, definitionally—it almost can't even happen by accident.

Q. If Dr. Moshman when he talks about his exercise of doing that being based "on realistic cost accounting assumption", if it is Dr. Moshman's testimony—if it is—that his exercise distributing these costs on a pieces and weight or some such "objective accounting criteria" does lead to the tracking of cost causality [R. 9579] is it not the case that you would disagree with him?

A. If that is what he is saying, the answer is yes. But I might still suggest that his exercise is something the Commission should look at.

Q. But if those are his reasons, not for the reasons that he gives but for the reasons that you have given?

A. That is correct.

Q. When you suggest the concepts of levelized markups to distribute institutional costs, or at least as a starting point for that distribution, would you include that concept among accounting criteria?

A. Yes.

Q. So accounting criteria are not limited to such factors as weight, volume, and time utilization? Those are the specific things you enumerated on page 15 of your testimony.

A. No, they are not limited to that. I hope I said "for example", but I may not have. I said "et cetera".

Q. Did you mean to suggest, Dr. Cicchetti, that it is a function of accounting technique to simply levelize all markups? That that is an accounting technique?

A. It is an accounting technique. It certainly is not the only accounting technique. I think you will find that if you were to look at fully distributed costs, or fully allocating costs using an accounting cost of [R. 9580] service technique you will find that there are probably 30-odd methods that one could find described and explained in various public utility cost accounting textbooks. Levelized markups, or levelized rates of return would be one of more than 30 different approaches that would be utilized.

I am not endorsing any of them.

[R. 9581] Q. I just want to know whether or not we are enshrining an utterly arbitrary technique with the mystique of being called an accounting technique. Let me ask, suppose you say as a first step after we have all our marginal costs let's just mark everything up 15 percent right across the board. Would you call that an objective accounting technique?

A. Yes.

Q. Well, do the words objective accounting technique have any meaning?

A. I believe it does if you compare it with, let's say, subjective judgment, or if you compare it with value of service.

Q. I take it you would agree then that any mathematical computation any mind can conceive of is an accounting technique, an "objective accounting technique" so long as you apply the same exercise to each and every rate?

A. I would go along with that if you would eliminate any use of demand information in that mathematical formula.

Q. Except for that?

A. Yes.

Q. And consequently the only significance we can attach to the characterization of these techniques as objective is the fact that they are applied in each and [R. 9582] every instance, is that correct?

A. Yes.

Q. And it does not necessarily imply by the use of the word objective in that context then that it excludes subjective judgments?

A. I think subjective judgment falls out of the set. So it does exclude subjective judgment.

Q. You mean to tell me it is not a subjective judgment on your part which one of these infinite number of mathematical calculations you choose to employ?

A. Oh, I think that certainly is a matter of subjective judgment. But I am differentiating between the judgment that goes into selecting the method, which I grant you is at least available to 30-some odd approaches as I have indicated this morning. Which of those you select — and I don't believe they are quite an infinite number, but there probably are a large number, that is 30 or more different approaches you should select. Now, that is a matter of subjective judgment to pick those methods.

If you were purely picking one of those methods then it would be subjective judgment.

If you were looking at many of them for the purpose of creating a reasonable range, then when you made your decision looking at the reasonable range that would also be a subjective judgment.

[R. 9583] So subjectivity enters in. And I guess if I am flawed in my explanation it is not making it clear that I am speaking in relative terms rather than absolute terms and I think you are quite right in pointing out that these things run

together much more so than it might be evident in reading my complete testimony.

But my message is, I hope, clear now this morning of what it is I am trying to say. I am not endorsing a levelized markup. I am certainly not endorsing the Moshman approach, nor do I think he is. I think he has made it clear in his answer to Reader's Digest he is offering it as an example of one of the cost allocating methods.

And I am suggesting that this Postal Service Commission in this case, or in future cases, may look at several of these different methods and make its final judgment which in the final analysis is going to be subjective.

COMMISSIONER DuPONT: If I may interrupt, Mr. May?

MR. MAY: Yes.

COMMISSIONER DuPONT: I think the witness misspoke when he cited this as the Postal Service Commission. That is something we are very concerned about, making emphatic to the public, that we are [R. 9584] independent of the Postal Service.

THE WITNESS: I am sorry for that slip. I think I did say Postal Service as opposed to Postal Rate.

PRESIDING OFFICER FRITSCHLER: I think this point is probably made clear now on the record.

MR. MAY: Yes.

BY MR. MAY:

Q. Doctor, when you state that you would suggest that levelized markups be one of the alternatives that are considered, I assume that the precondition you require as a point of departure from which levelized markups would be applied is proper measurement of marginal costs, is that correct?

A. Yes, that would be—if one were approaching this thing in a formal way that would be the most obvious and I think the most compelling chain of logic to apply. There are others that

could get you to slightly different positions, but certainly if I were starting from scratch that would be the logic I would prescribe people to utilize.

Q. With respect to the measurement of marginal costs would you turn to your answer to USPS Interrogatory 17-B?

Are you stating in that answer that you would accept variable costs as a real world aproximation of marginal cost if variable costs include long run as well as [R. 9585] short run variable costs?

A. Yes.

Q. Is one of your objections to the level of attributable costs as measured by the Postal Service based on your contention that they include only short run variable costs?

A. Not exactly, although that is part of the difficulty that I think there is between the percentage of attributable and the overall costs that the Postal Service incurs.

Q. Well, do you believe that their costs, if they don't exclude long run; at least understate long run variable costs?

A. Yes, that is my belief.

Q. Do you know what percentage of the attributable costs of the Postal Service in this proceeding are identified as longer run attributable costs?

A. No, I do not.

Q. Well, I think if you will read Mr. Dalton's testimony, page three of his Exhibit 8-C, you can derive the percentage. If you will accept my calculations of that fact, having given the record reference, it is some 17 percent.

A. Could you tell me whether that is 17 pecent of the total or 17 percent of the percent that is attributable?

[R. 9586] Q. Perhaps I better show it to you.

(Document handed to witness by Counsel May)

BY MR. MAY:

Q. I think you would agree that that percentage is a percentage of total attributable cost, is that correct?

A. That is correct.

Q. Does that impress you?

A. I don't know how to explain "impression". I am certainly now aware of what the numbers are.

Q. Well, does it help assauge your concern over the exclusion or understatement of longer run attributable costs from the Postal Service's variable costs in this case?

A. Not really. I am also concerned about the percentage of costs which are short run costs in terms of what they represent as a percentage of total costs as well.

I recognize, for example, that a good part of the cost — I am not sure of the exact percentage. I have seen several different references to it — are labor-related costs.

I also recognize in the short run labor contracts are fixed, work schedules are fixed, and the rest. But it would seem to me given that large percentage of labor costs that it is not too long into the future under which those are at least subject to change based upon rescheduling or based upon rerouting, or based upon many of those other [R. 9587] factors.

And to that extent it seems to me that the percentage of variable costs, if you include labor as well as some of the capital costs which are fixed in the short run but variable in the long run, the percentage that could be attributable taking a longer look, that is jumping beyond the period of the current labor contract, would be variable, and the percentage that I am seeing attributable seem too low to me given that set of facts.

Q. Now, Doctor, you have agreed that you would accept variable costs as a real-world approximation of marginal costs if the variable costs include both all the short run and the longer run attributable costs, variable costs, is that correct?

A. Yes.

Q. Do you contend that the Postal Service in this proceeding has excluded any short run variable costs?

A. It is not clear to me. I just don't know the answer to that question. It is because I don't know nor have I made any kind of complete study of what it is that the Postal Service has measured under the definition of short run variable costs. My testimony is not directed at having completed anything like a full economic auditing of what it is the Postal Service went out and measured.

Q. And we do know now, do we not, from that exhibit [R. 9588] you have before you, that the Postal Service has not excluded longer run attributable costs from variable costs? In fact some 17 percent of their total variable costs are longer run, is that not the case?

A. Of their total attributable costs are what they call longer run as opposed to short run?

Q. Yes. So we do know that they have included some longer run attributable costs, isn't that the case?

A. Yes.

Q. Do you have any way of knowing whether they included all of them?

A. No.

Q. Isn't it the case that they may have in fact included all the short run and longer run attributable costs? So far as you know, Doctor.

A. I would be very surprised. But I have no basis of quantifying the difference between what they have said they have done and what my expectations are, other than the fact that the enterprise seems to be coming down with a lesser pecentage of attributable costs in 1980 than they did in 1977, and that they did in 1974. And I can think of no reason why the percentage of nonattributable costs, that is the percentage of

overhead, would be increasing over the last several years. In fact if anything it would seem to me that it would be decreasing as the Postal Service is [R. 9589] applying greater moves for economic efficiency and cost minimization, which would mean that it is in fact taking into account adjustments in schedules, adjustments in routes, adjustments in some of the costs which were contractually fixed in the past.

So if anything, I would think that as the Commission indicated, I believe, and the court indicated. I believe, in the previous case, they expected the Postal Service to do better in 1980, and in fact the empirical evidence is that they have done less. And I can't think of any reason why.

I won't say there may not be reasons why, but what I am trying to explain as my surprise, it is because of the falling off of the percent attributable, or the increase in the percent residual, whichever way you want to look at those two issues, which seems to have occurred.

Q. May I suggest a reason?

A. Certainly.

Q. A possible reason. You said you cannot think of any. Isn't it possible that the Postal Service and this Commission were wrong in 1974 and 1977?

A. That is a possibility.

Q. You had not thought of that one?

A. Well, I guess in all honesty I have thought about that as a possibility, but it seemed to me that if the only [R. 9590] information I had before me was the quantitative numbers that I have described maybe I would have given that possibility more thought than I did. But in fact other information was available to me. And the other information that was available to me was the application in the past, the attempted application of value of service, and then inverse elasticity, which is the kind of application of a pricing rule that I would expect a monopolist that was trying to make up revenue in one market in order to drop prices in markets where it faced competition.

That information, that past set of attempts, makes me very very worried when I see this percentage falling off, and I don't believe the Commission was—and the Postal Service—was necessarily wrong in the past. I believe when I take into account how this percentage has changed and how they have been told, the Postal Service, not to use value of service, not to use the inverse elasticity rule, it seems to me that throwing more costs into overhead is the kind of response that I would expect an enterprise that was trying to deal with competition by having some classes carry the load for other classes.

And with that information I have reached a purely subjective judgment.

Q. And one that you reach, I take it, as a suspicious human being and not as an economist?

[R. 9591] A. Economics has provided me with the basis for the suspicion. And maybe the technical skills to look for certain kinds of things in certain kinds of markets.

But I reach the conclusions I have reached not on the basis of an economic analysis that I have undertaken, but on the basis of what might properly be characterized as my natural suspicion.

Q. Let me just, before we proceed further, ask you one more question:

You are an economist. And you are charged with finding as much cost causality as you can. And you find X percent. And the Court of Appeals says "Doctor, that was wonderful. Now the next time around we sure hope you are going to have a lot more".

As an economist, is that necessarily doable, just because the Court of Appeals says "We hope you are going to do it"?

A. It isn't, unless the first time around that led to this review by the Court of Appeals I admitted, or it was obvious that I was not able to look at all the possible cost variations that were in the system. And if it was not possible to look at all the

possible cost variations in the system, then the answer is yes, it would be doable.

If I had exhausted all of the engineering and economic avenues of analysis that were open to me in that [R. 9592] first proceeding, and there was X percent of costs that just could not be untangled, they were joint costs in the pure economic sense, and there was nothing happening over time that was going to change that basic underlying joint cost, then it seems to me that no matter what the court says I just could not possibly do it.

Let me give you an example of that:

I have no idea what the number is, but suppose the Postal Service has to spend X millions of dollars every three years for a rate case. Well, I don't know how to allocate the costs of a rate case across customer categories. I cannot see how changing the volume of service for category one or two, three or four, could possibly affect that cost of involvement in a rate case unless an entire service were to be eliminated and therefore there would be a slight reduction in the number of interveners that might be involved in a case.

So I think that the cost of a rate case, there is no way possible to ever allocate those costs, they are purely joint to all of the services that are employed.

If that were the only percentage that were left over I don't see, no matter what the court encourages you to do, that you could ever improve on that percentage. But I think there are costs other than the cost of a rate case that are in this system that we should be assured people [R. 9593] have tried to allocate.

Q. I take it that one of your handicaps, Doctor, is that you have not gone back to the record in 1974 and 1977 and scrutinized each and every cost subcategory and the percentages that were found to be attributable for either short or longer run? You have not done that so you have no way to make a specific judgment as to whether the Postal Service or the

courts or anyone else was correct or incorrect when they so characterized those costs in those proceedings, is that not the case?

A. That is correct. My knowledge is limited to those three previous cases to three things. The decisions themselves of the Postal Rate Commission, the Court of Appeals decisions, and the commentary that other economists have made on those decisions that I have read in various professional journals or edited volumes.

So I have not made the kind of study you have talked about. But my conclusions are not casual, they are incomplete perhaps, but not casual.

Q. But you express surprise and suspicion of the fact that the total amount of attributable costs has declined rather than increased. I put it to you, Doctor, that your suspicions may be allayed had you gone back and looked at those costs because you may have concluded, it is possible, isn't it, that the Commission was incorrect and the [R. 9594] Postal Service was incorrect in so characterizing some costs as attributable in those previous proceedings, and that on the contrary they are correct this time?

That is a possibility, is it not?

A. It is a possibility. I am not necessarily convinced that even if the possibility were true I would continue to deal with the residual costs, the overhead costs in exactly the same way as the Postal Service has continued—

Q. But we are focusing now on the variable costs.

A. But I will concede that the error could have been made in the past and that this is in fact—whatever it is—almost 60 percent or slightly more than 60 percent is the ultimate amount of variable costs, long and short that one could estimate. That is a possibility.

Q. And it still nevertheless remains your testimony that it is possible that the Postal Service has in fact this case dis-

covered all of the short and longer run attributable costs and if so that that is a real-world approximation of marginal costs, is that not the case?

A. All of that would be a possibility given the assumptions you have made. And I am speaking purely hypothetically, rather than using the word "possibility" as connotating any expected endorsement of that result. Hypothetically speaking your logic is quite correct.

[R. 9595] Q. Dr. Cicchetti, back to your use of accounting factors such as pieces and weight to reduce the percentage of total costs. You state that you would use such accounting factors to reduce the percentage of total costs that are not allocated to specific Postal Service—

A. Not allocated using marginal costs or this motion of variable costs we are talking about?

Q. That is correct.

A. Yes.

Q. Would you assume hypothetically that the Commission accepts your approach.

A. Yes.

Q. At what point would you stop the application of that approach?

A. If I were on the Postal Rate Commission I would probably want to see it carried, A, to its ultimate, that is zero overhead, and B. I would probably want to look at other stages between what the Postal Service has come up with, which has roughly 40 percent of overhead, I probably would want to look at other numbers, maybe ten, 20, 30. But I would want to look at other numbers to reach the judgment that I knew that in the final analysis as a Commissioner I would have to apply. And I don't think there is a precise number of what it is that we can go through on this. But I think that it is appropriate for [R. 9596] commissions to look at, let's call it a menu of choices before reaching the decision they have to reach.

Q. But just to offer some practical guidelines, the fact of the matter is that through the device of using pieces and weight you can allocate the entire remaining amount, can you not?

Leaving zero amount to be allocated according to the noncost factors of the act? Isn't that the case?

A. You could.

Q. Well, would that be legal?

A. Well, I am not a lawyer. As I pointed out in my answers I think to your interrogatories I don't read the English language as saying "considering" means utilizing. It means considering. Factors can be considered and rejected. If lawyers agree with that interpretation of the English language that I read—now I am not testifying here as a lawyer, certainly—then I would say that it would seem to be legal to consider something doesn't mean to utilize something. And I read those other factors as considerations, rather than requirements.

Q. But you would believe that it would be, according to your understanding of the Postal Reorganization Act, (an un- ' standing which, I take it, has informed all of your testimony), perfectly nsistent with the Act if it should be the case, that you would not distribute one [R. 9597] dime of cost to any class of mail in accordance with the noncost criteria of the Act?

A I believe that result, as I read the difference between requirements and consideration, which in one of the previous Court of Appeals cases that distinction was made, I believe that that would permit—I am not suggesting it be followed, but I believe it would permit using one requirement which is cost causality, or cost of service, to be carried through logically to the 100 percent point and therefore by definition leaving this Commission to consider all other factors and summarily reject them. I believe that that narrow reading is possible, but I am saying it is a matter of—I am not making that as a basis of my testimony, but I am describing that in formulating my testimony that was the reading I used both of the Act and of that previous court case.

Q. So a predicate to your testimony is that, if this Commission chooses, it may totally disregard all of the noncost factors of the Act in the results of the rates that they set?

A. No, it wouldnt be disregarding them, it would be considering them and rejecting them.

Q. After having considered them they say we are not going to use any of them. That is a predicate to your testimony, that this Commission is free to do that?

[R. 9598] A. I believe that they can, I am not suggesting that they should.

Q. My question is not—I did not ask whether you were recommending they do that, I am trying to find out what you are recommendiong, but you do believe, and it has informed your entire testimony, that if the Commission chooses to, after considering the noncost factors, they may totally reject them? Is that your testimony?

A. I think—the answer to your question is yes. But let me explain. I think that the act of consideration is a continuum. One could let consideration be used to its fullest extent, one could let it be used hardly at all or not at all. I believe that the act of consideration has to be applied in a way of deciding where on that continuum, from let's say 100 percent utilization of something you are considering to zero utilization of something you are considering is possible. In formulating my testimony I have tried to emphasize the use of economics, and the use perhaps of accounting of economics doesn't carry you far enough to develop the pricing of Postal Service. I have also though in my testimony suggested to the Commission, am suggesting to this Commission that they should look at these other factors that they are supposed to consider and they should look at the extreme case, perhaps, of fully allocating costs on the basis of economics and accounting [R. 9599] as one of the starting points as they are then trying to decide which factors to weigh and how to weigh them. But I am not suggesting at all that they jump to the conclusion that there are no

overhead costs and therefore there is no room for applying the judgment in the utilization of these other factors.

I am not saying that my entire basis—I don't want to say that the entire basis of my testimony starts from the predicate that they should reflect everything but the one criterion that is the cost causality standards. I am not saying that. But I have looked at that as a possible circumstance. If that circumstance legally were to be impossible, that is if my reading of the English language is wrong, then there is still basis for just about everything I have said in my testimony.

At least that is my belief, and my testimony this morning.

Q. Now, it would help us all, wouldn't it, if in using your technique we all knew what the total percentage—what percentage of total postal costs were marginal costs? Wouldn't it? If we knew, for example, that it was 75 percent, that would be a big help in applying your technique, wouldn't it?

A. It would, but let me make one thing very clear. That is that it is possible to have an enterprise for which [R. 9600] the marginal costs are more than 100 percent of the total cost. There is nothing that says it is impossible to have the percentage of causally related costs, that is the costs that you can attribute on the basis of causality, it is impossible for that number to be greater than 100 percent, but if you were out there measuring the marginal costs, which is the cost of the last increment of providing a particular service, as contrasted with the average cost causally related to that service, that percentage is possible to be greater than 100 percent.

So if we understand that then we would get useful information knowing that the percentage of marginal costs is 75 percent, but we may not be able to draw from that the conclusion that 25 percent is then overhead. Unless we are saying that the percentage of causally related costs is 75 percent, then we could know or draw from that the conclusion that 25 percent was overhead.

PRESIDING OFFICER FRITSCHLER: Let's take a ten minute recess at this point.

(Short recess was taken.)

PRESIDING OFFICER FRITSCHLER: Mr. May, I apologize for the interruption, and Dr. Cicchetti. You may continue now, Mr. May.

BY MR. MAY:

Q. Dr. Cicchetti, among the other things I think you [R. 9601] just told us is that marginal costs is not equivalent, necessarily, to cost causality, is that correct?

A. That is correct.

Q. Well, I would refer you to your answer to RD Interrogatory 5. There you say "Speaking generally about certain possible rules of thumb that can be used to estimate marginal costs, i.e., cost casuality". I take it you misspoke there?

A. No, I didn't.

Q. Well, if marginal cost is not the same thing as cost causality, then what is the gloss you want to put on your answer?

A. I don't want to put any gloss in it, I want to try to clarify these terms.

The distinction I am trying to make probably is best made by agreeing that we will use the word "attributable" costs to be those costs, the percentage of total costs which are based upon either marginal costs or cost causality.

The distinction I am trying to make is that when one uses the term marginal cost precisely one measures causal costs but one reduces that measurement to something like the cost per unit, and when were talking about these terms we were talking about it as a percentage of total cost. I wanted to make that distinction, that there [R. 9602] is no reason why the cost per unit of the let's say marginal unit or the incremental unit, there

is no reason why that number times the number of units in question has to be less than a hundred percent. But there is every reason why the percentage of total costs that are attributed or assigned in a causally related way, if that is calculated as taking total costs and subtracting residual costs or overhead costs or joint costs, the costs you can allocate, if you calculate causal costs by the subtraction method, then that number by definition has to be less than a hundred percent. And I was trying to make that distinction.

I think I used them carefully and precisely in my testimony and in my interrogatories. Maybe I didn't. But on the basis of your question I saw a point of confusion and I was trying to clarify.

Q. Well, let's use cost causality rather than marginal costs then.

How do you know at what point of use pieces and weight exceeds the level of cost allocations that reflect cost causality?

A. I have no way of knowing.

Q. Referring back to your answer to RD Interrogatory 8, you state when you refer to the use of pieces and weight that you are "Speaking generally about certain possible" [R. 9603] "rules of thumb that can be used to estimate marginal costs, i.e., cost causality". In other words, to estimate cost causality?

A. Yes.

Q. Would you agree that the marginal cost estimates could be radically different depending upon whether the rule of thumb is pieces, weight, or some combination of the two?

A. Yes.

Q. Have you conducted any studies, or can you cite to any studies by anyone else that would help this Commission determine which rule of thumb or which combination of rules of thumb should be used to measure cost causality?

A. No.

Q. Would you agree that in the absence of a cost analysis to determine how well the various rules of thumb approximate cost causality, that the application of such rules must depend upon judgment in their selection and weighting?

A. Yes, but it is not the kind of judgment that is without some basis either in economics or engineering or common sense. But, yes, without those studies you would be using judgment. But it is not broad judgment, but judgment nonetheless it still is.

Q. Would you agree that the cost estimates would be [R. 9604] very different if the piece-pound weightings are, say, 80 percent-20 percent, or conversely, 20 percent-80 percent respectively?

A. Yes.

Q. Would you turn to your answer to USPS Interrogatory 28?

You have stated that you would start with levelized markups and deviate only when there are good public interest reasons for such deviations. Do you recall that?

A. Yes.

Q. Putting aside value of service reasons for deviating, would you regard compliance with any of the other noncost factors of 3622(B) as providing reasons to deviate from levelized markups?

A. I have the gist of the Question, I forget where the negative comes or whether there was a negative. My answer is I believe the other noncost factors are useful reasons to deviate if in the Commission's judgment these should be applied.

Q. With regard to your rejection of value of service pricing, do your objections arise from a concern that through such pricing the service may abuse its legislatively authorized monopoly power?

A. Yes.

[R. 9624] Witness: Charles J. Cicchetti

1. At page 16 of your testimony, you state that you "favor the use of accounting criteria for allocating the remaining cost of service shortfall," leaving "nothing to judgment and value of service abuses."

a) Explain in detail how the use of accounting criteria to fully allocate residual costs would allow the non-cost factors of the Act to be taken into account.

b) At page 52 of your testimony, you describe the accountants' approach as "allocating costs by association, hypotheses and proxies". Do you consider this approach better for allocating residual costs than an approach which relies on the non-cost factors? If your answer is yes, explain in detail why you believe it is a better approach.

(a) They would not. However, it is not my understanding all non-cost factors must be utilized in allocating costs and designing tariffs. Instead, I believe they must be considered, which I interpret to mean they can also be rejected, or at least greatly down-played.

(b) Yes, when the non-cost factor in question is value of service. See my answer to Interrogatory 3 of the Reader's Digest Association. ". . . as a matter of first principle prices (i.e., revenue) should be based on marginal costs (properly defined and estimated as described in my testimony). Overall revenue requirements set the level of prices. If there is a gap pragmatic decisions have to be made. If formulae or proxies are to be used I prefer those that can be objectively measured, and which are simple proxies of cost causality, rather than misleading, but elegant expressions [R. 9625] of value of service.

(d) Some costs cannot be untangled. These are called "joint" costs. These can be ignored if prices based on cost causality produce too much or just the correct level of required revenue. If there is a revenue shortfall other factors must be used. I prefer objective measures which are related to cost causality by weight, volume, time utilization, etc. to be used

rather than to rely on purely subjective judgment. I should point out that I put value of service in this latter category."

Also, my answer to Interrogatory 1 of the AAP-RIA is relevant. There I discussed my views on Fully Distributed Costs (FDC) and value of service.

"In summary I prefer using cost causality by which I mean marginal cost. But if cost causality is not or cannot be measured, then I prefer using indices like weight, number of pieces, etc., which are the essence of Fully Distributed Costs, rather than value of service pricing.

As for the bases for the Postal Rate Commission's use of FDC, this is not by recommendation. Instead I suggest its use as a proxy for, or as an estimate of, cost causality for the portion of revenue that is not causally related to specific services."

* * * *

[R. 9637] A. Well, it is an interesting aspect of economic theory that defines competitive firms as having a cost structure that you take a longer view as opposed to a snapshot view, that all costs are in fact variable, and those competitive firms which are in a position of being able to attract higher profits, those profits in fact become returns to the owners of that enterprise and, therefore, they become variable costs taking a longer view.

So to answer your question, the distinction you are making between totally variable costs firms and competitive firms, when you really get into economic theory and the definition of competitive firms, that distinction evaporates over time.

But I see the purpose of your question, and total variable costs reflected in prices, whether they be long-run or short-run, is the circumstance for that relationship to result. It is not the characteristic of competition. It is the characteristic of having prices that are based upon total variable costs.

Q. When you speak of the longer run, what do you have in mind?

A. Well, this is going to sound like I am trying to run in circles, but the definition of longer run is the period of time under which all costs to the enterprise are variable.

[R. 9638] Q. For the Postal Service do you have any view on what that p.riod of time would be?

A. I don't think you can ever get all costs to be variable in any real sense, but you certainly have to look beyond labor contract periods. Probably have to look beyond the economic live of equipment that is used for mail handling, the economic lives of buildings and vehicles that are use for transportation. I have no idea whether those economic lives, when you consider these factors, are five years, ten years, or 15 years. With today's interest rates it is probably more like ten years or less. But definitionally it is when all costs are variable. But the definition of variable that is being used as the economic life of the equipment, and economic life depends on interest rates, unfortunately. So the answer would change if interest rates were to be six percent than 20 percent.

Q. Thank you very much.

I have just one further question for the purpose of clarification.

In your answer to Postal Service Interrogatory 25, subpart (b), you speak of "competing alternatives". Have you had a chance to review that?

A. Yes.

Q. Are those alternatives within the Postal Service? I was thinking of non-Postal Service competing

* * * *

[R. 9727] Ph.D. dissertation with you?

A. In fact he did. I knew I could get that, but I didn't feel it was worth the effort if he was unwilling to share it.

Q. Who was it that decided what you would read and what you would not read in the area of economies of scale in the Postal Service?

A. I made that decision.

Q. How did you know what to look for?

A. The purpose of my comments on the presence of economies of scale or not economies of scale is really to recommend what I think this Commission and other parties in fact in this proceeding will take as a serious thing that they will look into in the next Postal Rate proceeding.

I think the question is at least up for grabs about whether there are economies of scale or diseconomies of scale, and I have tried to indicate in my testimony that there is evidence both ways, and that nobody that I am aware of has done a really complete and—nor has anybody completed a study that I am aware of that is without its major critics. And there is a very important issue here in terms of the presence of economies of scale or diseconomies of scale. And it is not the one that you normally think of in Postal Rate proceedings, it is one

* * * *

[R. 9745] A. No. 2, yes.

Q. Have you investigated why that is the case?

A. Other than the fact that I know that there are other pieces of mail that are not called First, Second, Third and Fourth that would be part of the total number of pieces that have been omitted, which I have indicated in that response, other than that obvious deduction on my part I have not made any investigation.

Q. Could you turn to your response to Postal Service Interrogatory No. 42, please?

Is it correct, Dr. Cicchetti, that the article coauthored with Jurewitz, which you refer to in that response, is not the only publication ever made by you of views supporting application of the inverse elasticity rule?

A. I am not positive. I suspect if we include in publications perhaps some questions that I may have been asked, or—

Q. Perhaps testimony?

A. Perhaps testimony. Cross-examination more likely.

Perhaps some papers probably unpublished that preceded this one where I was discussing the conclusions I was reaching as I was in the process of preparing this paper that is attached. But I have tried not to hide [R. 9746] anything from you, I just tried to make it very clear that while seeing the theoretical value in the inverse elasticity rule I have very strong reservations about the application of the inverse elasticity rule from any kind of applied or real world regulatory process. And I tried to make that clear.

I know your question, if I am recalling it, was telling us every single place you may have ever uttered those words in any favorable way, and as that might have been completely open ended, and nothing more would have been learned, I don't think, than what is in this article, I answered the question by merely presenting the article and tried to excuse my early interest in the inverse elasticity rule as the folly of one's youth rather than the sober reflection of the real hard facts of life.

Q. Well, since we are not trying to hide anything, Dr. Cicchetti, is it correct that as late as 1974, after five years of professional experience, that you supported application of the inverse price elasticity rule in a Federal Power Commission proceeding in sworn testimony?

A. I would have to see it.

Q. Would you like to see it?

A. Sure.

(Document handed to witness by Counsel Foster)

[R. 9747] BY MR. FOSTER:

Q. If you w uld, I believe it would be helpful to turn to pages seven and eight of the document which I have just handed you..

A. On those pages I suggest two ways of doing it. And I certainly believe in the second approach if one has to choose

between these two is the way to handle the question of a company, or an enterprise that has diseconomies of scale, that is rising costs, would get too much revenue from pricing on the basis of marginal costs, and has to have some way of giving back that revenue to customers. I would prefer a blocking approach under those circumstances to an inverse elasticity approach.

Q. And at the time of that testimony did you not say, and I quote, "Therefore, I favor the first, or inverse elasticity approach"?

A. Yes, that is what I said.

1974 was a period of my life that I associate with my youth. It was early 1974. I probably prepared these comments in 1973.

It is true that I had my Ph.D. in 1969, but this is 1980.

Q. It also happens to be a period of my life when I took class from you, so I don't think that is an adequate excuse.

TESTIMONY OF NAGCP WITNESS: JACK MOSHMAN (CROSS)

[R. 9876] 4. Which of the three methods of allocating institutional costs developed in your testimony (pieces, weight, and average of pieces and weight) do you believe is most appropriate in postal ratemaking? Please discuss the advantages and disadvantages of each method in your response.

> I do not believe that any one of the three examples is necessarily most appropriate. It was my intent to develop allocation procedures based on two objectively measured quantities—pieces and weight. My third method was one of a continuum of procedures combining the other two methods with appropriate weighting coefficients. I can develop the consequences of any set of weighting coefficients, but am not expert in the ranking of policy choices which would be the foundation of determining the relative importance of pieces and weight.

* * * *

[R. 9878] 5. (a) Were any of your allocations of institutional costs to classes of mail according to distributions of piecs and weight based on principles of cost causation? If so, provide a full explanation of the principles you applied in order to make the allocations.

(b) Were any of your allocations of institutional costs to classes of mail according to distributions of pieces and weight determined by application of the non-cost criteria of section 3622(b) of the Postal Reorganization Act? If so, provide a complete description of your consideration of those non-cost factors for each and every class and subclass of mail.

(c) Were any of your allocations of institutional costs based on some other criteria? If so, what are those criteria and how were they developed?

> My intent in allocating institutional costs by piece and by weight was to demonstrate (i) how objective criteria may be used in the allocation process, and (ii) to illustrate some of the diversity of results obtained based on the criterion chosen.

* * * *

[R. 9882] 2. You offer three "objective factors" as bases for distributing institutional costs.

(a) Would you please confirm that the average unit revenue ("P") for parcel post is $1.75 (JM-2), $6.42 (JM-3) and $4.95 (JM-4), depending upon which of these factors is adopted?

I so confirm, but see my answer to 2c below.

(b) Would you please confirm that the average unit revenue for second-class regular-rate mail on the three corresponding exhibits is 15.9 cents, 40.8 cents and 30.7 cents?

> The average unit revenues quoted in the question were computed for a combination of second class regular rate outside county and controlled circulation publications.

(c) Given the wide range of unit revenues for the various mails and services, depending upon which of the three volume factors is used [as indicated in (a) and (b)] would you agree that

ultimately a great deal of judgment will be involved in determining which of these factors would produce a rate design that best comports with the noncost factors of § 3622(b)?

> The chief advantage of using factors such as pieces of weight to distribute institutional costs is the objectivity with which it may be applied. Whereas the need for the exercise of judgment is not eliminated, its effect is circumscribed by the proposed methodology. Your question appears to imply that I advocate a choice need be made among the three factors I use as illustrations. I suggest that a proper choice be some combination of pieces and weight with judgment entering into the process by helping to decide the relative importance used to combine these two objective factors into a single composite measure.

[R. 9883] (d) If your answer to (c) is "yes", is it your contention that the judgment process involved in selecting one of the three factors would not be subjective? Please explain any "no" answer.

See my answer to 2c above.

(e) Given the wide range of unit revenue results produced by applying the three factors, as illustrated by "P" for second-class mail and parcel post, is it your contention that adoption of any one of these factors would produce rate results that more satisfactorily comport with the non-cost criteria of § 3622(b) than the rates proposed by the Postal Service? Please explain your answer.

> I am not qualified to evaluate the extent to which different rate proposals comport with the non-cost criteria in § 3622(b).

* * * *

[R. 9896] "and/or the weight of the mail in each category."

You go on to note in response to MPA Interrogatory No. 1—do you have that?

A. I think so. Which was that?

Q. MPA-1.

A. I have it.

Q. That you consider the Postal Service method of allocating institutional costs as subjective because it is "not based on any measurable quantities." Furthermore in response to MPA at 1-C you state the use of some combination—in my copy it says "price."

A. It should have said piece. My copy says price also.

Q. Some combination of piece and weight provides an objective factor which satisfies the statute's "noncost criteria."

Dr. Moshman, do you consider the use of pieces and weights to allocate institutional costs to be objective because, unlike the Postal Service method your method employes a quantitative dimension?

A. That I would say would be a major part of it, but any allocation ultimately is quantitative, you are dealing with numbers.

Q. Why is employing a quantitative dimension necessarily more objective than the Postal Service's method [R. 9897] of allocating it based on the factors in 3622(B)1 through 9?

A. Well, the answer to the first part of your question as to why it is more objective is the source of the quantities used in making this allocation, and the source for either pieces or for weight are available, they can be counted, they can be measured, and hence I would term them to be far more objective than anything that has been proposed otherwise.

Q. But Dr. Moshman, doesn't the very selection of a quantitative measure, in this case pieces and weights, involve a subjective choice that this measure is more important than other factors?

A. There is a subjectivity to this, which I point out I know in some of my interrogatories. The subjectivity employs both in the discussion of pieces and weights how they might be combined, and the possibility that there may be other—I keep going back to the term objective factors that might be used that might also be applicable.

This does not mean that what I have proposed here—what I have demonstrated here is a proposal as much as a demonstration that there are objective means to do this. And I have not made a proposal that any one of the tables I provided, or in fact the specific methodology is what I suggest the Postal Service use.

* * * *

[R. 9906] PRESIDING OFFICER FRITSCHLER: Do you have oral cross-examination, Mr. Burzio?

MR. BURZIO: Brief oral cross-examination, Mr. Chairman.

BY MR. BURZIO:

Q. Is it your understanding that there is any requirement that institutional costs be allocated on the basis of measurable quantities?

A. No absolute requirement to my knowledge.

Q. Could you explain for me—and this is in relation to your answer to MPA Interrogatories Nos. 10, 11 and 12, how it is going to help the Rate Commission to look simply at the number of pieces of a class or subclass of mail and the amount of weight of a class or subclass of mail in determining the effect which particular rate increases that this Commission recommends might have on those classes and subclasses?

A. I don't think that that contributes at all to looking at what the effect of any rate increase would have on these classes of mail.

Q. How would it help the Commission to determine whether or not there are available alternative means of sending and receiving letters and other mail matter at reasonable cost?

[R. 9907] A. That would not contribute to that either.

Q. Would it contribute to the Commission making an assessment with respect to the simplicity of the structure for the entire schedule and simple identifiable relationships between the rates and fees charged the various classes?

A. I think it might be useful in that respect. Insofar as there is a relationship between the volume and the weight from one class to another the use of procedures similar to what I have presented would contribute to a simplicity of structure. And the rest of that Item 7.

Q. Simplicity in terms of being—

A. Structure of the schedule.

Q. And what do you mean by schedule?

A. The postal rate schedule. I assume that this is what it is referring to.

Q. How would it help the Commission to make any assessment with respect to the educational, cultural, scientific and informational value to the recipient of mail matter if it just looked at the respective number of pieces and the amount of weight of the different classes or subclasses?

A. It would not have a direct effect there other than unless you equate bulk with the amount of knowledge contained in something. I am struck by the fact in reading [R. 9908] this again last night, preparatory to coming here today, there was nothing in the document that indicated that mail that had educational, cultural, scientific and so forth content value should bear either a lower or higher value. I think just as the Commission has to determine whether or not something having cultural value should either be costed at a higher rate because it is of higher value and hence of greater importance to the recipient, or should be in some sense subsidized because it transfers knowledge and this is a social good, so to do all these other things require some judgment. And I think judgment is a very important part of the rate making.

Q. Yes, but my decision was how does looking just at the number of pieces or the amount of weight help this Commission in making that assessment whether to charge more or to charge less based on that factor?

A. I indicated that unless one were to assume, which I would not, that bulk or weight was in some sense related to the amount of educational content, it would have no value.

Q. Did you make any analysis of the effect which the postal prices as they are reflected in your Tables JM-2 through JM-4 would have on mail users?

A. I made use of the relationship provided by Dr. Tolley in his testimony to relate the proposed, or any [R. 9909] rate, with volume.

Q. My question was did you make any independent assessment or analysis of the effect which those different rate levels would have on mail users. And in the case, for example, of Second Class regular rate the average revenue per piece reflected in those tables rounded off vary from 16 cents to 31 cents to 41 cents.

A. I made no assessment as to what effect these would have on the users of the various classes of mail.

Q. Did you make any assessment of the effect which those prices might have on the Postal Service?

A. Can you elaborate on that question? I did indicate what the income or revenue would be for the classes of mail assuming the elasticities presented by Dr. Tolley. So in that sense I did make some calculations that would bear on the effect on the Postal Service.

Q. And your calculations assume Dr. Tolley's elasticities?

A. With one exception.

Q. What was that?

A. On the own-price elasticities for First Class nonpresorted mail.

Q. Did you undertake any independent assessment or analysis of whether the users in each of these different classes of mail either could or would pay the rates which [R. 9910] your allocation of institutional cost would require?

A. I did not.

Q. Is it your opinion that the own price elasticities of Dr. Tolley's, which you used, are likely to remain the same in the face of the significantly different price differentials that are shown in your tables?

A. I can't truly answer that question. I suspect that a more searching examination should be made, which was neither possible for me, nor was it apparent in any of the material I saw that it was done by Dr. Tolley.

Q. If the own price elasticities were subject to change at those different price levels, would your volume estimates change?

A. Yes, they would.

Q. And if the volumes change would the revenue estimates change as well?

A. There is an interrelationship in there that would be hard to say exactly what the effect would be. Typically there would be a difference.

Q. But to the extent that your tables assume a common own price elasticity and no change depending upon price level, is it fair to state that they do not accurately reflect the likely impact on the Postal Service of your institutional cost allocations?

[R. 9911] A. That is a hypothesis that would have to be tested. I do not know that the own price elasticity would not be reasonably costed over the range that you discussed. It is possible, but I have neither any evidence to support or deny it.

Q. But you made no independent assessment?

A. None at all.

MR. BURZIO: None at all.

PRESIDING OFFICER FRITSCHLER: Thank you, Mr. Burzio. I have next on my list Mr. Todd for the Mail Order Association of America. Does he have a representative here:

(No response)

PRESIDING OFFICER FRITSCHLER: Then the two remaining parties are the OOC and the USPS. Let us go off the record for a moment to discuss scheduling.

(Discussion off the record)

(Short recess was taken)

PRESIDING OFFICER FRITSCHLER: We will reconvene at this time with Dr. Moshman being cross-examined by OOC. In the next ten or 15 minutes I am going to have to leave for an appointment and my colleague Vice Chairman Bright will preside at the hearing until they are finished this evening. When we adjourn tonight it will be announced that we reconvene 9:00 a.m. tomorrow morning and

* * * *

[R. 9934] BY MR. FOSTER:

Q. Have you ever heard of something called the inverse price elasticity rule, Dr. Moshman?

A. I have heard of it, yes.

Q. Do you know whether or not that is a rule that has been advocated by some as a basis for distributing institutional costs?

A. I have no knowledge of that at all.

Q. I would like you to assume that it has in fact been advocated in that context. Under that assumption—

A. Excuse me, could you be more explicit in both the—you might possibly have to define the terms for me. I am not an economist.

Q. Well, my questioning will be very hypothetical then, Dr. Moshman.

If in fact the inverse price elasticity rule is a methodology which can be used for distributing institutional costs, and if in fact it is applied by means of specific quantitative factors, would it be the case that using such a rule by your definitions to allocate institutional costs would be less subjective than the approach used by the Postal Service in this proceeding?

A. As I understand it, if the inverse elasticity would be calculated on the basis of some empirical evidence, is that correct?

[R. 9935] A. For instance, demand elasticity such as you have presented in the tables attached to the end of your testimony.

A. In that case I would consider that to be a possible objective means of allocating institutional costs.

Q. Would you consider it any less objective than the means for allocating institutional costs that you have used in your testimony?

A. Yes, in the sense that this is a derived estimated quantity which would have a fair degree of unreliability if one uses the usual sort of economic data, whereas the measures I proposed is weights and pieces, and may be directly counted or measured and hence do not suffer from that liability.

Q. Would you agree that there is a degree of uncertainty associated with the weight and piece measurements that you used in your testimony?

A. Oh, I am sure there is.

Q. And would you also agree that the choice as to what combination of pieces and weight to use in the distribution process is also a very subjective process.

A. It is subjective, certainly. At least in part.

Q. Would there in fact not be an almost infinite number of combinations of pieces and weight that you could use?

[R. 9936] A. Yes, there would.

Q. Would you agree that there are other measures such as you discussed with Mr. Stephens, time utilization, stops, and cubic volume that could be used in the development of an objective means of allocating institutional costs?

A. I have a little trouble with some of them, because some of these do not apply to all classes of mail. And there are certain classes of mail in which you cannot get a good direct counterpart.

On the other hand, they all have some characteristics of objectivity.

Q. Well, it takes time to handle all pieces of mail, doesn't it?

A. Yes, if you consider all the handlers along the way and you make the proper allocation. For example, a truck driver who is handling a van full of mail of all different types and you have to make some sort of determination of how much of this time is spent on one type versus another. That is a much more difficult problem than taking a sample and measuring Third Class bulk mail.

Q. Do you know whether the Postal Service has cost systems which develop time handling proportions?

A. I know of some procedures that I have heard of from other statistical readings in which instant snapshots [R. 9937] are taking of what is being done by a staff in a post office at any one time, which was a theoretically quite advanced and quite advantageous, but I have not heard that anything like this is applied outside of the postal handling operations. That is the mail sorting and related operations.

Q. Isn't it also true that mail of all classes is delivered?

A. Mail of all classes is delivered, but not all postal services consist of mail that is delivered.

Q. Could you give me an example of a class or subclass of mail which is not delivered?

A. I refer to a service, like a lock box in which there is a fee for the lock box. It is a service rather than a type of mail.

Q. Can you tell us whether any institutional costs associated with maintaining lock boxes have any relationship to pieces and weight?

A. I could find none, and in fact in what I did—and I mentioned lock boxes just because you have asked for an example. Many of these things were never spelled out in anything that I have seen grouped together into an all-other category. And as I recall I did not vary the allocation based upon pieces or weight but just fixed it at a constant.

[R. 9938] Q. So would it be correct to say that special services in the preparation of your testimony were not a subject of any particular concern?

A. They are a concern insofar as if the values were large they reduced the amount of institutional costs to be allocated otherwise, and vice versa if they were small. This also applies to Second Class fees and Third Class fees which I could not associate with any volumes or weight.

Q. You made no alterations, is that correct, to special service fees or to fees such as that for Second Class?

A. I did not allow them to vary in the various procedures I used, but fixed them and kept them outside of the algorithm that was described in my testimony.

Q. Because of a lack of any relationship with the pieces and weight?

A. Exactly.

Q. Were you consistent in that approach?

A. I tried to be, but perhaps my unfamiliarity with all the details of the Postal Service faulted me somewhere.

Q. Did you look, for instance, at the various cost segments and components and determine whether the costs within those segments and components which were not attributed by the Postal Service had any relationship to [R. 9939] pieces and weight?

A. I looked at them from a somewhat different point of view in determining whether they should be treated as on the whole variable or as fixed costs for a category of mail. But other than some of the transportation matters in which I received some of the comments from Mr. Abraham while he was pursuing his own investigations, I did not look at it from that point of view.

Q. So your answer is no?

A. That I did not look at either pieces or weight in the cost components, that is correct, I did not.

Q. Did you read Mr. Dalton's testimony?

A. I extracted some of my information from there. I may have skimmed over the total testimony, but did not spend a great deal of time on it.

Q. Is it your understanding that Mr. Dalton adjusted short-run attributable cost to account for something called the mail volume effect?

A. I don't recall seeing that. If he did I am unfamiliar with it.

Q. Is it correct, Dr. Moshman, that in the case of projecting volume for nonpresorted First Class letters and sealed parcels that at least implicity you used a different volume forecasting equation for your after-rates estimation than was used to develop before-rates

[R. 18,455]

REBUTTAL TESTIMONY OF KERRY E. LEGGETT ON BEHALF OF NATIONAL NEWSPAPER ASSOCIATION

My name is Kerry E. Leggett and I live in Ord, Nebraska. I am currently publisher of the local weekly newspaper, entitled the *Ord Quiz*. The *Quiz* has been in the hands of my family since the early 1900's, and I became publisher in 1966. The *Quiz* has a circulation of 3,300, with approximately 2,200 of those mailed. Of those 2,200, roughly 850 are mailed within-county.

The purpose of my testimony is to respond to the direct testimony of Officer of the Commission Witness Stephen Libster with respect to his proposed rates for the preferred within-county and limited circulation subclasses of second-class mail. My interest in this testimony is only to illustrate the substantial effect that his proposed rates could have upon my publication. I do not claim to be an expert nor do I make any representation concerning the newspaper industry as a whole, all National Newspaper Association members, or any other newspapers, individually or in groups.

I would like to begin my testimony with a brief description of the community the *Quiz* serves. Ord is a [R. 18,456] village of approximately 2,400 population which is located some 60 miles northwest of Grand Island, in the center of Nebraska. Ord sits astride a juncture of two types of agrarian areas: to the east crops are grown, and to the west and north cattle are raised. The *Quiz* serves these surrounding agricultural areas as well as Ord. The only other media outlet in the immediate area is a small radio station. Grand Island has radio and television stations whose signals reach the area. However, neither the Grand Island nor the local stations carry a significant amount of news and information of a local character. The cable system has no local coverage whatsoever. Residents, then, rely upon the *Quiz* for their local news and other information, such as advertising.

The *Quiz* itself, as you no doubt can imagine from our circulation size, is not the plush publication with computerized printing and other futuristic features one might envision if not familiar with rural publishing. Rather, it is a struggling operation, forced to use obsolete equipment, such as letter presses, with offices in a 19th century building which hardly bring to mind the set of *Lou Grant*. The average issue is no more than a 16-page broadsheet publication. Also, the *Quiz* is a locally officially designated newspaper for the carriage of public notices. As an interesting note, the *Quiz* is the only newspaper of that name in [R. 18,457] the country, and its name antedates the first entry of the word "quiz" in the dictionary back in the late 1880's.

I have reviewed the rates Mr. Libster proposes for second-class in-country and limited circulation mail. Based on his phased scheduling in OCC 902A, I could expect my in-county cost to rise 28% immediately. My limited circulation cost would rise nearly 11% immediately. This would require roughly a 9% rise in my subscription rates.

From past experience, I have learned that I can expect to see a drop in subscriptions of approximately 5% from such an increase. Over the past ten years, due to postage increases, the *Quiz* has lost between 5 and 10% of its mailed subscribers, despite an increase in local population over the same time period.

The increase has ramifications in the advertising area where advertisers may refuse to continue to pay rates based on a higher circulation. Thus, it can be a double blow threatening the financial stability of the *Quiz*.

Perhaps more directly of concern to postal authorities is that to the extent these subscriptions are cancelled, they are removed from the mailstream. Although a certain amount of the cancellations can be recouped through over the counter sales in Ord, very few of those cancelling eventually resubscribe. Any recoupment, then, is external to the mailstream [R. 18,458] and not recapturable volume.

On a broader scale, many readers who might drop their subscriptions could lose their access to local news and information. For example, some will simply not obtain the newspaper because of its increased cost. Others may find themselves lacking the time and opportunity to leave their farm or ranch responsibilities behind in a given week in order to travel to Ord to make an over the counter purchase. Or, they may obtain it only after it has lost its time value. Bearing in mind the lack of other souces of local news and information, steeply increased postal rates will effectively deprive not a negligible part of the readership of the *Quiz* of that local news and information. This, in my opinion, seems to be contrary to one of our fundamental and traditional beliefs that our democratic society cannot function without an informed populace.

The problem severely intensifies with the enormous rise to the full proposed in-county and limited circulation rates. I really question whether the *Quiz* could continue to survive economically if I compensated for such a rise with a proportionate subscription rate hike. And, it would be financially impossible for the *Quiz* to simply absorb such an increase.

At the very least, I would be forced to actively consider going totally to over the counter sales; to simply [R. 18,459] withdraw from the Postal Service. Whether over the counter sales could support the *Quiz* is problematic. However, no other alternative exists because the population density here is too light to make private delivery a viable option. And, were the *Quiz* not to survive, the implications for the community should be self-evident from my foregoing discussion. Minimally, there would be a significant reduction in subscribers, with the accompanying loss to them of access to local news and information.

I also have noticed that in his testimony, Mr. Libster failed to propose—or to comment in any way upon—a presort discount for in-county mail, or extending the discount in limited circulation to carrier route. The *Quiz* is totally presorted to carrier route. Since payment—in the form of a discount—for

the work we save the Postal Service would help cushion the blow from these or other increases, I would hope that you may actively consider the concept. I know that NNA has proposed a 1¢ per piece discount for carrier route presortation for both in-county and limited circulation. Since I have no experience in setting rates for government services, I cannot judge whether 1¢ is appropriate. But, I surely endorse the concept; it is only fair and it will help me considerably.

In sum, the constant postal increases—more than 400% over just the past ten years—are gradually pushing [R. 18,460] me at minimum out of the Postal Service, and at maximum out of business. The *Quiz* has difficulty in keeping pace with inflation, let alone a rise that far outstrips it. While I hope to remain with the Postal Service, the proposed rates advocated by Mr. Libster, if adopted, may simply force me to find an alternative—if I can.

[R. 13,420]

DIRECT TESTIMONY OF DAVID A. BUNN

My name is David A. Bunn. I have been the Executive Vice President of the Parcel Shippers Association since July, 1969. In that capacity I am responsible for the managment of the Association, and legislative direction and relations with government agencies, including the United States Postal Service. From February of 1967 to January of 1969 I was the Regional Director, United States Post Office Department, in Denver, Colorado. From February 1965 to February 1967 I was an Assistant to the President of the United States on the Congressional Relations Staff of The White House. From September 1962 to February 1965 I was the Director, Office of Regional Administration, of the United States Post Office Department. In that capacity I was responsible for administrative direction of the fifteen regional offices. From 1961 to 1962 I was an Assistant to the Deputy Postmaster General. From 1958 to 1960 I served as Administrative Assistant to the Governor of the State of Colorado.

I received a Bachelor of Arts Degree from Texas Christian University with a Major in Government and History and a Master's Degree in Public Administration from the University of Denver.

[R. 13,421] The Parcel Shippers Association is an organization of approximately 200 members, primarily small businesses, who use the Postal Service to deliver small parcels to their customers. A large number of our members are also extensive users of the United Parcel Service as well as the Post Office for delivery of parcels. Our members are also heavily reliant upon the Postal Service as the principal means for soliciting sales from their customers; and these customers in turn use the Postal Service to place orders for merchandise, and to pay their bills for that merchandise.

The Parcel Shippers Association generally supports the Postal Service proposal to create separate Intra-BMC and Inter-BMC rate schedules for parcel post. From a comparison of the proposed rates which would be applicable to these new rate categories it is obvious that, to some degree, the Postal Service will be more competitive with the current United Parcel Service rates. While the Association does not have precise information as to the usage of carriers by all of its members, it is clear that United Parcel Service is the dominant carrier of the parcels of members of the Association. This is the reverse of the situation which obtained prior to the last several parcel post rate increases ordered by the Postal Rate Commission. For a substantial part of our membership, particularly the high volume shippers, United [R. 13422] Parcel Service enjoys a near monopoly on the carriage of the majority of their business.

There seems to be general satisfaction among the membership with the service offered by United Parcel Service; however, the membership believes that it is an unhealthy condition to be the captive of one dominant national parcel carrier. The Association members believe that it is absolutely essential to their own economic health, and to a viable and efficient national transportation system, that there be at least

two national small parcel carriers. This was the situation that existed prior to the enactment of the Postal Reorganization Act and the fixing of parcel post rates according to the criteria of that Act.

For the sake of perspective we do think we should point out that prior to postal reform, unlike all other classes of mail, including first class mail, parcel post rates were not subsidized through congressional appropriations. Parcel post rates were required to recover within 4% of the total cost of providing parcel service, the cost computed on a fully allocated cost basis under the old cost ascertainment system.

Thus, despite the fact that parcel post had to fully recover its costs through rates, and received no subsidy from the Congress, the Postal Service was nevertheless able to compete effectively with both the United Parcel [R. 13,423] Service and Railway Express, a now defunct small parcel carrier. The decline of the parcel post system can be dated directly to the enactment of postal reform and the fixing of parcel post rates according to the methodology the Commission and the Courts have decreed that Congress required in that Act. Thus, despite the fact that the Postal Service has increased its productivity, and has a substantially reduced work force, compared to the number of employees on the rolls at the time of postal reform, the parcel post system has declined to the point where it is an insignificant factor in the shipment of business parcels, while remaining the sole carrier, for all practical purposes, of the single parcel shipment of the householder.

The decline of the parcel post system, and the ascendancy of United Parcel Service to the position of a monopolist can be traced, it is our conviction, to the fixing of parcel post rates in a manner which totally disregarded the competitive effect of those rates on the parcel post system.

I might also state that had the ratemaking provisions been construed and so applied as to drive parcel post rates lower than United Parcel Service rates, to the effect that United Parcel Service was competitively eliminated as an effective

national parcel shipment carrier, this Association would be before this body opposing a rate system which had [R. 13,424] the inevitable result of destroying the other national small parcel carrier.

Consequently, the Association is pleased that the proposed parcel rates would make the Postal Service marginally more competitive in some selected areas of the small parcel business. Our enthusiasm for the proposal, however, is tempered by the fact that we believe the rates are still too high; that parcels shipped in bulk are still priced as though they had the same costs as a single parcel tendered to a postal clerk; and by the fact that the proposed rates offer no meaningful chance for recapturing any significant part of the lucrative business parcel traffic.

Our analysis of the proposal indicates that on those parcels eligible for the Intra-BMC rate, United Parcel Service will still continue to enjoy a rate advantage for the dominant portion of the traffic. The break points are 9 pounds for local parcels, 12 pounds for zone one and two parcels; 8 pounds for zone 3; 5 pounds for zone 4; and 4 pounds for zone 5. The Postal Service states that over 86% of all potential Intra-BMC traffic is local, zones 1 and 2. Thus, for 86% of the potential traffic, UPS will continue to enjoy a rate advantage, in the case of local parcels up to 8 pounds and, in the case of zones 1 and 2 parcels up to 12 pounds. Postal Service Witness Allen stated that 72% of parcel [R. 13,425] volume is in the 2 to 5 pound range, and United Parcel Service stated (R77-1) that 45% of its business is in that range. As will be more fully detailed in this testimony, the vast proportion of the total parcel volumes of members surveyed lies in the range of 1 to 10 pounds. It would seem clear, then, that the Intra-BMC rates schedule poses no real competitive threat to United Parcel Service for the predominant amount of volumes available.

The analysis of the Inter-BMC rate schedule shows United Parcel Service rates will still be competitively superior for weights less than the 13 to 20 pound range, depending upon the zone. Thus, the UPS rate schedule is virtually invulnerable to

the Inter-BMC rate proposals up through the 15 pound range. According to Witness Allen this constitutes the weight range for 90% of the Postal Service volume; and, according to UPS testimony filed in R77-1, constitutes 74% of UPS volume.

It seems clear that, given the characteristics of the volume that exists, neither the Intra- nor the Inter-BMC rates proposed by the Postal Service provide a meaningful competitive threat to UPS.

In an effort to determine the effect that these new rate schedules might have on the membership, I caused a mail survey to be taken of the reactions of the membership to the proposal. A copy of the survey questionnaire [R. 13,426] that was sent to all members is attached to my testimony as Exhibit 1. Forty-eight members (of some 200 possible) responded. With few exceptions, the members of the Association who ship parcels in the largest volume are numbered among those who did respond.

In an attempt to be helpful to the Commission in supplying additional information for its consideration of this proposal I will summarize the results contained in the questionnaire that were answered. We do not contend that these answers are representative either of the entire membership of the Association or of parcel shippers generally. They thus constitute only an indication of the reaction of these 48 companies and what they would or would not do if the proposal were adopted.

Of the 48 companies responding to the survey questionnaire, the total parcels shipped annually by both United Parcel Service and the Postal Service (1 lb. or more) total 72,065,500. Of this total 55,283,000 are shipped through United Parcel Service and 16,782,000 by the Postal Service. Thus, United Parcel Service accounts for approximately 77% of the carriage and the Postal Service 23%. This indicates UPS has increased its share from the 75% reflected in the last survey conducted for MC78-1.[1]

[1] It should be understood, however, that this is a substantially larger survey response; and the respondents are not uniformly identical.

[R. 12563]

Before the
POSTAL RATE COMMISSION

Postal Rate and Fee Changes, 1980: Docket No. R80-1

Direct Testimony of
HAROLD I. BERLINER ON HEHALF OF
UNITED PARCEL SERVICE

INTRODUCTION

My name is Harold I. Berlinger. I am a partner in the accounting firm of Peat, Marwick, Mitchell and Co., where I specialize in the areas of strategic planning, budgeting, cost control, management accounting, and operational and financial management.

During my thirteen years as a professional consultant, I have advised a wide variety of commercial and manufacturing companies and governmental agencies on the application of industrial engineering and cost accounting techniques in budgetary, financial management, and operational control matters. Prior to joining Peat, Marwick in July of 1967, I had plant and executive management responsibility for a major manufacturing company in the publishing industry.

[R. 12564] I graduated from Columbia College in 1961 with a B.A. degree, and received my Bachelor of Science degree in Industrial Engineering from Columbia University's School of Engineering in 1962. I am a member of the American Institute of Industrial Engineers and the American Production and Inventory Control Society. I am currently Vice-Chairman of the Operations and Planning Committee for the New York State Society of Certified Public Accountants. I am a frequent lecturer on topics of operational and financial management concerns before a number of professional organizations, including the New York State Society of Certified Public Accountants and the National Association of Accountants.

I testified before the Postal Rate Commission on cost accounting matters in Docket No. MC78-1.

SCOPE OF TESTIMONY

In general, the Postal Service distributes to the mail classes on a cost-of-service basis only those costs which are demonstrably variable with mail volume. Even here, the test applied in several cost segments is short run proportional variability. Almost all other costs it calls "institutional." The more costs that are called "institutional," the more flexibility the Postal Service has to propose rates on purely subjective bases, such as its competitive posture.

[R. 12568]

I.
THE POSTAL SERVICE'S PROPOSAL IS A REGRESSION TO OVERLY RESTRICTIVE AND REJECTED COSTING PRINCIPLES

In each successive rate filing before the Postal Rate Commission since the enactment of the Postal Reorganization Act in 1970, the Postal Service has, through the prodding of the Commission and the courts, attributed and assigned to the various classes of mail increasingly higher percentages of its total accrued costs. In each proceeding, evidence was presented to advance and define concepts of cost accounting for the purpose of identifying and distributing the costs of accepting, processing, transporting, and delivering the mail.

Table 1 on the following page shows the evolution of attributable and assignable costs since the establishment of the Postal Service. In the most recent general postal rate case (Docket No. R77-1), cost-of-service principles were used to attribute and assign 75% of total costs to the various classes of mail.[1] However, in this filing, the Postal Service proposes that only 59% of its costs be attributed and assigned.

---

[1] See Exhibit UPS-3A to my testimony for a more detailed presentation of attributable/assignable cost by cost segment in each docket.

[R. 12569]

TABLE 1

LEVELS OF ATTRIBUTABLE, REASONABLY ASSIGNABLE, AND INSTITUTIONAL COSTS RECOMMENDED BY POSTAL RATE COMMISSION IN DOCKET NOS. R71-1, R74-1, R76-1, AND R77-1 AS COMPARED TO AMOUNTS PROPOSED BY THE POSTAL SERVICE IN R80-1

	Docket No. R71-1	Docket No. R74-1	Docket No. R76-1	Docket No. R77-1	Docket No. R80-1[a] (Proposed)
Attributable Costs	$4,784,065	$6,298,200	$8,112,000	$11,423,902	$13,076,738
Reasonable Assignable Costs					
Service Related Costs	0	0	0	1,207,957	0
"Latent Capacity" and Other Costs	0	0	0	0	139,700
Contingency Costs	0	0	324,500	475,351	396,500
Total Reasonably Assignable Costs	0	0	324,500	1,683,308	536,200
Total Attributable/Assignable	4,784,065	6,298,200	8,436,500	13,107,210	13,612,938
Residual Costs	4,745,966	5,695,200	5,734,300	4,477,992	9,349,754
Total Revenue Requirement	$9,530,031	$11,993,400	$14,170,800	$17,585,202	$22,962,692
% Attributable/Assignable	50%	53%	60%	75%	59%

[a]USPS-8C, pages 2, 7, and 8.

[R. 12570] This regresion to a level of attribution below that achieved by the Commission in Docket No. R76-1, where 60% of total postal costs were attributed, is based on the Postal Service's glaring failure, in virtually all cost segments, to adhere to cost-of-service principles in determining the costs of the various classes of mail. The Postal Service achieves this step backward in large measure by restricting its interpretation of cost causality to the narrow definition of short-run proportional volume variability. But the use of this restrictive definition of cost behavior to distinguish between cost-of-service costs and residual costs has been thoroughly discredited and rejected by the court in both *NAGCP* decisions.

As I read the court's decisions, the Postal Service is required to seek out additional reasonable methods for attributing and assigning costs to the classes of mail based upon cost-of-service principles. The Postal Service should be seeking to maximize, *not minimize*, the percentage of costs to be so attributed and assigned. As was demonstrated in Docket No. R77-1, it is possible to attribute and assign at least 75% of total postal costs to the classes of mail. The Commission should reject any claim that residual costs are greater than the 25% level reached in the previous general rate case.

[R. 12617]

Docket No. R80-1
Exhibit UPS-3A

PERCENTAGE OF ATTRIBUTABLE/ASSIGNABLE COST BY COST SEGMENT AS RECOMMENDED BY POSTAL RATE COMMISSION IN DOCKETS R71-1, R74-1, R76-1, AND R77-1 AS COMPARED TO USPS PROPOSAL IN DOCKET R80-1[a]

Cost Segments	% Attributable/Assignable Cost				
	Docket R71-1	Docket R74-1	Docket R76-1	Docket R77-1	Proposed[b] R80-1
1. Postmasters	0%	0%	11%	25%	19%
2. Supervision	36	40	57	66	59
3. Clerks (1st & 2nd Cl. Ofcs.)	82	84	86	91	81
4-5. Clerks (Mobile & 3rd Cl. Ofcs.)	100	100	76	91	65
6-7. City Delivery Carrier	43	48	50	80	51
8. Vehicle Service Driver	0	0	0	36	16
9. Special Delivery Messsenger	100	100	100	100	100
10. Rural Carrier	15	58	46	73	22
11. Custodial	0	0	35	45	45
12. Motor Vehicle Service	0	18	35	70	34
13. Misc. Operating Expense	17	12	6	14	5
14. Transportation	78	95	94	93	80
15. Occupancy	0	0	82	65	74

[THIS PAGE INTENTIONALLY LEFT BLANK]

[R. 12617]

Docket No. R80-1 *Continued*
Exhibit UPS-3A

PERCENTAGE OF ATTRIBUTABLE/ASSIGNABLE COST BY COST SEGMENT AS RECOMMENDED BY POSTAL RATE COMMISSION IN DOCKETS R71-1, R74-1, R76-1, AND R77-1 AS COMPARED TO USPS PROPOSAL IN DOCKET R80-1[a]

Cost Segments	% Attributable/Assignable Cost				
	Docket R71-1	Docket R74-1	Docket R76-1	Docket R77-1	Proposed[b] R80-1
16. Supplies & Services	1	1	6	39	35
17. Research and Development	0	0	0	0	0
18. Administrative & Regional	1	20	29	68	52
19. Support Services	0	0	0	0	0
20. Depreciation & Servicewide	14	11	47	81	75
Overall Percentage of All Cost Segments	50%	53%	60%	75%	59%

[a]UPS-3A (page 2 of 2).
[b]Proposed by the Postal Service.

[R. 12847]
Before the
POSTAL RATE COMMISSION

Postal Rate and Fee Changes, 1980: Docket No. R80-1

DIRECT TESTIMONY OF ROBERT E. SMITH, VICE PRESIDENT, UNITED PARCEL SERVICE

INTRODUCTION

My name is Robert E. Smith. I am a vice president of United Parcel Service and a member of the national Management Committee, which is responsible for the overall operation of UPS. In 25 years with the company, I have had a broad exposure to many parts of the business and have been closely involved in the company's development into a nationwide service. I have appeared as a witness before the Commission in Docket Numbers MC73-1, R76-1, R77-1, and MC78-1.

The interest of UPS in this case is identical to its interest in every prior rate proceeding: the establishment of proper costing and ratemaking principles, as required by the Postal Reorganization Act, in order to insure fair postal competition with private enterprise [R. 12848] competitors. My testimony will review the competition that exists between UPS and the Postal Service and will cover the potential harm that could befall the private sector if approval is given to the Postal Service's present costing and rate proposals for parcel post and the other parcel services in fourth class mail.

It is with great disappointment and concern that UPS enters this sixth postal rate case in which it has participated. Over the past decade, we, along with other intervenors, the Commission, and the courts, have struggled to arrive at proper costing principles to guide future postal rate requests. While progress was gradual, UPS believed that many of the principles applied in the R77-1 case had established a sound basis for ratemaking in future cases.

Unfortunately, the Postal Service has decided otherwise and is endeavoring to turn back the clock to the very first rate case. It has ignored the admonition of the courts to attribute and reasonably assign costs to the maximum extent possible, and it is once again attempting to load the costs onto its monopoly service by proposing a 33% increase in the rate for first class mail while requesting little or no increases in the rates for its fourth class parcel services, where it faces competition. Once again, UPS finds it necessary to call upon accounting, engineering, and economics experts before the [R. 12849] Commission to assist in analyzing this latest attempt by the Postal Service to ignore the requirements of the law as interpreted by the Commission and the courts. UPS hopes the information presented by these experts will help the Commission to put postal costing and rate determination back on the right track.

Our major concerns, which are analyzed in depth in the expert testimony we present, include:

— The willingness of the Postal Service to operate at an overall loss in order to avoid rate increases and then to suggest that only one 8% rate increase within a 5-year period is adequate for parcel post.

— The reduction in attribution levels in the majority of cost segments. The net effect is a drop in combined attributed and assigned costs from 75% of total costs in R77-1 to 59% of total costs in this case. As a result, the costs subject to discretionary allocation have increased from 25% to 41%.

— This large pool of "residual" costs of approximately $9 billion has been largely imposed on first class mail in the form of a 33% rate increase, thereby subsidizing other services such as parcel post.

[R. 12850] — The parcel post inter-BMC rate increase is not applied to parcels weighing over 30 pounds and in most zones is not applied to parcels over 25 pounds. For the second rate case in a row, no increase in rates is proposed for heavier parcels.

— The new rate structure for intra-BMC parcels does not reflect all the costs involved and does not provide zoned rates reflecting the distances the parcels travel from senders to receivers. That rate structure should not be approved.

— No change has been proposed in the rates for fourth class bound printed matter, and a nominal increase of only 0.6% has been proposed for special rate fourth class.

After 10 years of experience under the Postal Reorganization Act and countless hours of proceedings, the Postal Service still refuses to accept basic issues as settled. After Docket No. R77-1 UPS justifiably thought that any increase in the revenue requirement would be spread evenly over all classes, unless specific exceptions could be proven and backed up with data. Instead, the Postal Service proposes rate increases ranging from 0% to 8% for parcels in fourth class, while proposing inreases for other classes of up to 107%. It is our [R. 12851] hope that, after reviewing all the testimony in this case, the Commission will reject the proposed intra-BMC rates as unsound and find that a rate increase for parcel post of at least 22% should be applied uniformly across all rate cells. In addition, the rates for parcels sent as bound printed matter and special rate fourth class should be increased by a percentage that is in the same order of magnitude as for parcel post.

UPS IS A NATIONWIDE COMPETITOR OF THE POSTAL SERVICE

UPS provides a prompt, dependable parcel delivery service for the general public throughout the nation. UPS has specialized in the delivery of parcels since its founding in 1907, beginning as a service for retail stores. Since 1922, UPS has provided parcel delivery service for all types of shippers as a regulated common carrier.

In 1953, we began to extend our common carrier service from a small operation in California to one covering increasingly broader areas of the country with a door-to-door pickup and delivery service. Today we operate in all 48 continental states,

on Oahu, Hawaii, and in Anchorage, Alaska, as shown on the attached map identified as Exhibit UPS-4A.

[R. 12852] In May, 1980, the ICC removed two restrictions that had applied to UPS interstate service for a number of years. One was a limit of 100 pounds total weight for packages sent by one shipper to one consignee on one day. The other prohibited UPS service from retail stores to their customers. Although certain limited geographical restrictions shown on UPS-4A still apply to our interstate service, an application to remove these restrictions is pending. An Administrative Law Judge has recommended their removal, and we are now awaiting a final decision from the Interstate Commerce Commission.

In addition to this interstate service, UPS has intrastate operating authority in 46 of the 48 contiguous states. Applications for intrastate authority are pending in Texas and Oklahoma, the two remaining states.

With these few exceptions, UPS service is available to everyone, everywhere, and we hope that the exceptions will soon be removed.

For a number of years, UPS has provided a combined ground and air service, which we call our Blue Label Air service. Utilizing commercial airlines and charter flights, Blue Label Air provides reliable second-day service to most areas of the country. As a result of recent Blue Label Air expansions, UPS will be able to offer the public two-day service to virtually any point in [R. 12853] the nation beginning on August 18, 1980. In 1979, almost 29 million packages were sent by Blue Label Air service.

As our service has developed, the number of UPS people has increased to 114,000 in 1979, and our automotive fleet has grown to over 58,000 vehicles. More than 500,000 shippers use our service daily, and millions of consignees receive UPS deliveries each day.

Exhibit UPS-4B to my testimony is an audited schedule of UPS revenues, costs (including federal income tax), and net income for the five years ending December 31, 1979, prepared by our auditors, Touche Ross & Co., and is submitted as required by the Commission's rules.

UPS is a large user of first class and third class mail. Our first class postage payments exceed $5 million per year, and our third class postage costs are more than $300,000 per year.

The contributions of UPS and of many other small shipment carriers to the national economy, both in the provision of a needed public service and as substantial taxpayers to local, state, and federal governments, will not continue to be possible unless a fair competitive climate exists between the Postal Service and private enterprise delivery services. As a result, it is important to examine closely the nature and extent of this competition, especially since Section 3622(b)(4) of [R. 12854] the Postal Reorganization Act requires consideration of "the effect of rate increases upon . . . enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters."

UPS AND THE POSTAL SERVICE OFFER SIMILAR DELIVERY SERVICES

Both UPS and the Postal Service accept packages from the public, transport them to their destinations, and deliver them to consignees. There are some differences, however, in the features of the two services.

UPS will make a pickup at *every* point desired by *every* shipper, large or small. Our pickup service is also available to every shipper regardless of his location. We provide pickup service to the occupants of a skyscraper, at a suburban address, or at a farm in a sparsely populated area. In addition, UPS maintains customer counters at all of its 1,100 operating facilities, where a shipper may turn a package over to us for delivery without using our pickup service.

The Postal Service, on the other hand, makes no pickups—except on a selective basis for certain favored high-volume shippers, based on its own convenience.

UPS will deliver a package to any and every address, whether it is in an urban, suburban, or rural area. We make deliveries every business day whenever and [R. 12855] wherever we have packages to deliver, so that deliveries are completed on a dependable and predictable basis.

The Postal Service, on the other hand, does not provide parcel delivery service to people in thousands of towns where there are post offices. Postal patrons in these communities must go to the post office to pick up their packages.

The principal features of our common carrier service are described in Exhibit UPS-4C, which accompanies my testimony.

UPS has uniform maximum weight and size limitations per package of 50 pounds and 108 inches in length and girth combined. These limitations closely approximate those of parcel post, which has two package weight limitations (70 pounds and 40 pounds) and two size limitations (100 inches and 84 inches in length and girth combined), determined by the size of post office at origin and destination.

Our package delivery charges are based on the weight of each package and the zone to which it is sent, as are those of parcel post. Exhibit UPS-4D contains a schedule of the present interstate rates of UPS, and compares those rates with the current rates for parcel post.

While our service is most often compared with fourth class zone-rated parcel post service, we also deliver packages of the type handled in other subclasses of [R. 12856] mail, such as books, records, film, educational materials, and catalogs. In addition, we compete for packages weighing less than one pound of the type handled by the Postal Service in third class mail, as well as for parcels sent as priority mail. In fact, the Postal Service handles many more parcels in these other

classes than it does in zone-rated parcel post. The total of all packages handled by the Postal Service and by UPS during the past five years is shown in the following chart:

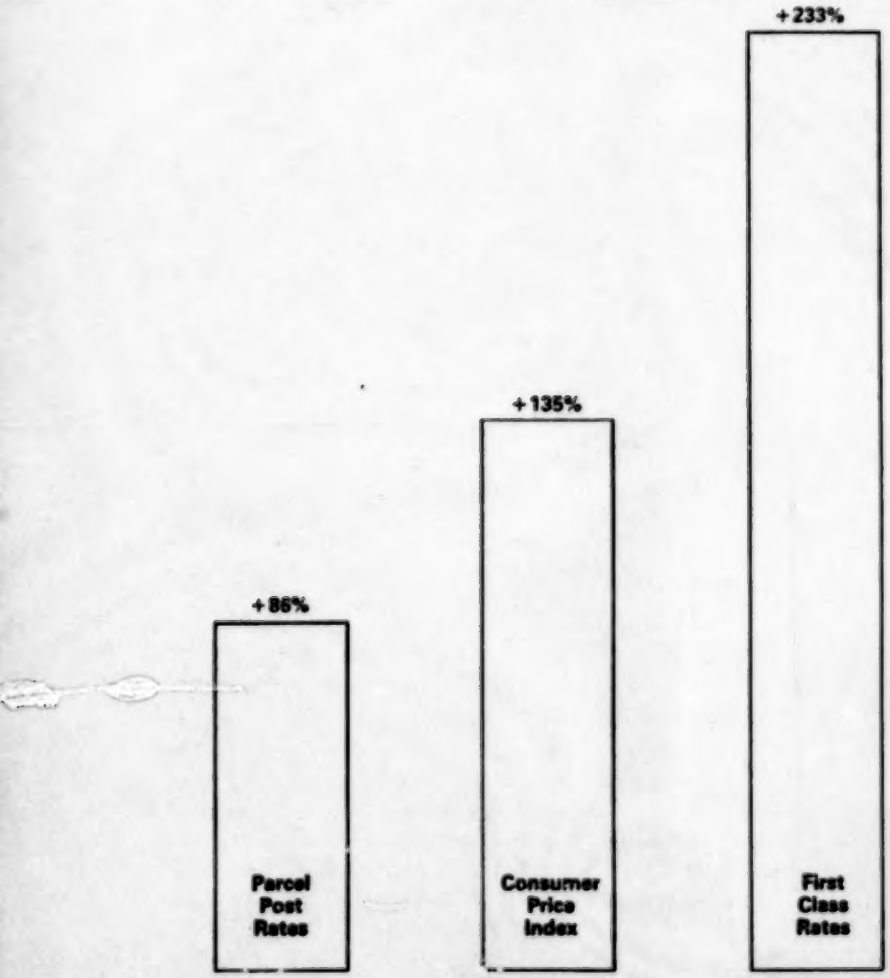
Packages (in millions)

	Postal Service	UPS
1975	1,358	930
1976	1,301	950
1977	1,330	1,178
1978	1,309	1,309
1979	1,249	1,437

R. 12878
DOCKET NO. R80-1
EXHIBIT UPS-4E

CHART SHOWING THAT PARCEL POST RATES ARE NOT KEEPING PACE WITH THE CONSUMER PRICE INDEX OR FIRST CLASS RATES

Percentage Increases, 1976 – 1981



NOTE: Parcel Post And First Class Rates Include R80-1 Requests.
Consumer Price Index Actual To June 1980 And Estimated To March 1981.

[R. 12,967] Testimony Of UPS Witness Smith (Cross)

4. In reply to protests to the lack of uniformity in its package and poundage rate increases, UPS failed to provide any cost data but instead relied entirely upon the change in the parcel post rate structure which became effective May 29, 1978, as demonstrated by the following statements by UPS:

(a) "Its principal competitor for that traffic is the United States Postal Service and . . . the Postal Service has recently increased substantially its charges for the transportation of small shipments *without increasing at all the charges on the heavier shipments.* It would be futile and self-defeating for United Parcel Service to ignore this competitive circumstance and to propose to acquire its needed additional revenue by a percentage increase straight across the board." (emphasis in original) Reply to Protests and Petitions for Suspension; Suspension and Fourth Section Board Case No. 69060. United Parcel Service, General Increase, 19, April 19, 1979.

(b) "Although we have already so stated, it will bear repetition that the rate proposal in this instance *is the result of a managerial decision by UPS and that decision was reached in full contemplation of the competitive circumstances with which UPS is faced.* It is the firm belief of UPS management that the heavier shipments should make some additional contribution to the carrier's revenue need but it is also management's belief that any greater burden assigned to those larger shipments would be counterproductive. There is no merit in the argument of the Parcel Shippers Association that the increase proposed here should have been uniform for all shipment weights." (emphasis added) *Ibid,* at 26.

(c) "UPS has heretofore advised the Commission that the United States Postal Service has revised its parcel post rate structure substantially by restricting its increases to only light-weight parcels. If UPS does not conform its own rate structure to that trend, it will find itself priced out of the market for the transportation of the heavier packages. UPS is not free to

set its rate structure to conform to a [R. 12,968] cost curve because if the forces of competition change the consist of its traffic the repercussions upon its own costs will be enormous." Reply to Protests and Petitions for Suspension; Suspension and Fourth Section Board Case No. 69265. United Parcel Service, General Increase, 17, July 3, 1979.

(d) "We have already explained how the constraints of competition forbid spreading a revenue increase equally over all traffic." *Ibid*, at 24.

(e) "If it is to remain competitive, United Parcel Service cannot permit its rates on the heavier packages to rise any more than is unavoidable." Reply to Protests and Petitions for Suspension; Suspension Board Case No. 69875, General Increase, United Parcel Service, 6, April 7, 1980.

A. Denied as stated. UPS provided such cost data as was required by the Interstate Commerce Commission in support of its rate filing. It is admitted that the quoted statements appear in the cited UPS Replies to Protests and Petitions for Suspension.

* * * *

[R. 13,004] 59. What percentage of UPS volume consists of parcels that move in fourth-class parcel post (re: parcels of one pound or more which do not qualify for other classes of mail)?

A. No UPS parcels move in fourth class parcel post. However, to the extent that they were within the size and weight limits of parcel post, all UPS surface parcels could be sent by parcel post. Approximately 75% of UPS surface parcels could not qualify for other subclasses in third class or fourth class.

* * * *

[R. 13,162] fact that the Postal Service did not raise its rates in the heavier weights we were forced to recognize that competition and the rates in the heavier weights were not increases as much, but they were increased.

Q. Your testimony includes a criticism of the Postal Service for the failure of the parcel post rate increases to keep pace with consumer price index increases, is that correct?

A. I don't know that I specifically criticize it. I offer that as an indicator of where parcel post rates are in relation to what has been happening in the consumer price index. We also offered the increase in First Class rates to see where the parcel post rates were in relation to that.

Q. During the period covered by your Exhibit 4-E have United Parcel Service rates kept pace with the consumer price index?

A. I don't have the figures on the consumer price index on an annual basis and where our rates were. We have given in answer to an interrogatory the cumulative effect of our rate increases during the same period of time and that figure was 107 percent.

Q. And that is to be compared with the consumer price index of 135 percent?

A. If you would like to compare it, yes.

[R. 13,163] Q. Well, you have compared parcel post rates with that figure, haven't you?

A. I have not compared those rates. The index is there for however you would like to use it.

Q. Does your Exhibit 4-E compare the increase in parcel post rates with the increase in consumer price index?

A. Yes.

Q. And parcel post rate increase is less than the consumer price increase?

A. Yes.

Q. And by the same token the increases in UPS rates during this same period of time are less than increases in the consumer price index?

A. The UPS increase, which happen to be 21 percent more than parcel post, are slightly less than the consumer price index, I agree.

Q. You have indicated that UPS rates reflect the effect of weight on the handling and processing of parcels, is that correct?

A. Yes.

Q. UPS has not identified the cost variability of handling parcels with variability of weight, has it?

A. Only to the extent Mr. Kloss addresses it in his testimony.

* * * *

[R. 13,208] 12. Please break down the FY 1979 Postal Service volumes shown in the table at p. 10 of your testimony by class of mail, and provide the calculations underlying each component of your total of 1,249 pieces.

A.

Class of Mail	1979 Parcel Volume* (Millions)
Priority Mail	229
Parcel Post	204
Bound Printed Matter	102
Special Rate	247
Library Rate	62
Third Class Parcels	405
	1,249

*Sources: USPS-7E, Docket No. R80-1, and Tr. 1390, Docket No. MC78-1.

[R. 24116]
Before the
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes, 1980: Docket No. R80-1

MEMORANDUM OF THE UNITED STATES POSTAL SERVICE

The Postal Service files this memorandum of law and policy in order to make known its position on questions of interpretation of section 3622(b) of the Postal Reorganization Act (the Act) which have vexed the Service, the Commission, and the users of the mails since the promulgation of the opinion in *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) (*NAGCP* I). These questions have been squarely raised in this proceeding by the Magazine Publishers Association, Inc. (MPA). Prehearing Conference Statement of MPA, May 5, 1980 at 1-2.

As will emerge more fully from a reading of this memorandum, the Postal Service believes that, although *NAGCP* I is now the prevailing interpretation of section 3622(b), that case was wrongly decided. Our filing which launched this docket follows the dicta of *NAGCP* I. For the information of the Commission and the parties, therefore, we are filing concurrently with this Memorandum a document which will trace the effects upon rates of the interpretation of section 3622(b) which we believe to be the correct one.

[R. 24117] I. PRESENT LEGAL STATUS OF SECTION 3622(b) OF THE ACT

As the Commission and the parties are well aware, the United States Court of Appeals for the District of Columbia Circuit has provided the only judicial interpretation of section 3622(b) of the Act. In *NAGCP* I, the court of appeals interpreted that section of the Act as requiring the allocation of

costs within a framework of three cost categories. The Court stated:

> Subsection 3622(b)(3) provides . . . that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the non-cost factors set forth in the Act.

569 F.2d at 589 (footnote omitted).

Another panel of the same court declined to overturn this position in the subsequent appeal from the Governors' decision in Docket No. R77-1. *National Association of Greeting Card* [R. 24118] *Publishers, Inc.* v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, ___ U.S. ___ (1980) (*NAGCP* III).[1]

Regardless of our views on the correctness of the court's reasoning in *NAGCP* I, it stands as the controlling judicial interpretation in the District of Columbia Circuit of the Act's provisions relating to the costing of postal services. Furthermore, although appeals from the Governors' decisions on

---

[1] The Court's position on *NAGCP* I in the context of review of the Docket No. R77-1 decision was not, however, without reservations. The court stated:

> We are also concerned that our ruling may have been carried too far, beyond what was originally envisioned. We would not wish our rulings to result, by virtue of misapprehension, in a loss of efficiency that was not required by or implicit in the statutory mandates.

NAGCP III, *supra* at 402.

rate and classification matters may be taken in any circuit, appeals from all of the prior four rate decisions have been heard in the D.C. Circuit. In light of this fact, the prospect of obtaining inconsistent opinions from other circuits is not very great.

Notwithstanding that *NAGCP* I is the prevailing opinion in the D.C. Circuit, it must be understood that the court's interpretation of the Act has yet to be reviewed by the United [R. 24119] States Supreme Court. Such a review, moreover, has been vigorously sought by various parties to rate proceedings in two Commission dockets. The Postal Service asked the Solicitor General of the United States to petition for a writ of *certiorari* to the D.C. Circuit on *NAGCP* I. Although Department of Justice attorneys agreed that review of *NAGCP* I would not have been inappropriate had the case which gave rise to it not been moot, the fact was that it was moot. The issues in Docket No. R74-1 the proceeding which gave rise to *NAGCP* I, had been mooted some time before by implementation on a permanent basis of rates recommended in the succeeding rate case, Docket No. R76-1. In this connection, it must be noted that the *NAGCP* I decision itself was issued almost six months after the permanent rates established in the succeeding case had been implemented. The court of appeals recognized that the case was moot, but unlike the Solicitor General's office, felt that it fit one of the exceptions to the mootness doctrine, namely, that it was capable of repetition, yet evading review. *NAGCP* I, *supra* at 578 n.21.

The Governors' decision implementing the Docket No. R76-1 rates was challenged in the court of appeals in July, 1976, before the decision in *NAGCP* I was issued. While the action was pending, however, the Commission recommended new rates in Docket No. R77-1. Pursuant to the Governors' approval, those rates became effective May 29, 1978. In light of the status of the [R. 24120] Docket No. R77-1 rates, the Postal Service moved to dismiss the challenge to the Docket No. R76-1 rates, and the court dismissed the action on June 27, 1978.

The Docket No. R77-1 rates were challenged in *NAGCP* III. In that decision, the court of appeals upheld the Governors' decision based upon the Commission's recommended decision, which the court found to be in accordance with its pronouncements in *NAGCP* I.

Several parties thereupon petitioned the Supreme Court for review. The petitioners, who included Dow Jones & Company, Inc., MPA, Time, Inc., and American Business Press, Inc., in essence argued that the decision in *NAGCP* III was incorrect because it was based on the erroneous interpretations of the Act enunciated in *NAGCP* I. The Solicitor General filed a brief stating the Postal Service's position, which was fundamentally in accord with the positions of MPA and Time. As a bottom-line conclusion, however, the Solicitor General opposed the grant of a writ of *certiorari*. A critical factor in the Solicitor General's decision to oppose was the fact that the Postal Service's proposal in Docket No. R77-1 had attempted to comply with the court's dicta in *NAGCP* I and had been affirmed by the court of appeals.

The Postal Service continues to be of the opinion that the court decision in *NAGCP* I erroneously interpreted the [R. 24121] ratemaking provisions of the Act. As explained further below, the Postal Service believes that an interpretation of the costing section of the Act which requires two categories of costs, rather than three as proclaimed in *NAGCP* I, is the correct legal interpretation.

[R. 24122] II. THE TWO-COST INTERPRETATION OF SECTION 3622(b)(3) WAS SUPPORTED BY THE CONTEMPORANEOUS AND CONSISTENT POSITIONS OF THE POSTAL SERVICE AND THE POSTAL RATE COMMISSION

The two-cost interpretation of section 3622(b)(3) of the Act, embodying the use of principles of volume variability to determine cost causality, was adhered to by both the Postal Service and the Commission in Docket Nos. R71-1, R74-1, and R76-1.

Although there was some dispute concerning the precise level of attributable costs, both the agencies with primary jurisdiction for interpreting and implementing the ratemaking provisions of the Postal Reorganization Act squarely agreed on the proper interpretation of section 3622(b)(3). For example, in Docket No. R74-1 the Commission found:

> Our task is to determine whether (average variable) costs are causally related to any class or service. Where, and to the extent that, the cost varies with a change in volume, we conclude that such a causal relationship exists and it is appropriate to use the average cost. Thus, we are fulfilling the statutory requirement, as we construe the statute, by establishing rates based on volume variability . . .

Docket No. R74-1, Postal Rate Commission Opinion and Recommended Decision, Vol. 1 at 115 (words in parentheses supplied). The Commission also determined:

> The failure to isolate variable costs from fixed costs in the ratemaking process can lead to discouraging profitable business and subsidizing unprofitable business. This in turn leads to an unnecessarily high level of costs and raises everyone's rates higher than necessary.

[R. 24123] *Id.* at 113. The Commission's reaffirmation of volume variability as the prime basis for determining cost attributions, and acceptance of Postal Service analyses in that vein, was succinctly stated in Docket No. R76-1. *See* Docket No. R76-1, Postal Rate Commission Opinion and Recommended Decision, Vol. 1 at 75-78.

It was only after the issuance of the *NAGCP* I decision by the court of appeals that any departures from the two-cost, volume variability approach were suggested by either the Postal Service or the Commission. But it was evident that such departures did not result from any changes in position on the part of the two agencies. Instead, those departures were the product of efforts to conform with the prevailing interpretation of the ratemaking provisions of the Act.

As the Commission stated:

> We do not intend any departure here from our R76-1 method to imply that we desire to abandon that method. We continue to believe that the departures required by the Court are not required by the Act, and are difficult to implement on economic grounds.

Docket No. R77-1, Postal Rate Commission Opinion and Recommended Decision, (PRC Op.) Vol. 1 at 75-76. The Commission also asserted that the *NAGCP* I decision was "not inevitably required" by the Act and caused "difficulties" in its application. *Id.* at 9.

In their acceptance of the Commission's Docket No. R77-1 recommended decision on rates and fees, the Governors supported [R. 24124] the Commission's views concerning the incorrectness of *NAGCP* I. The Governors indicated:

> [W]e agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

Docket No. R77-1, Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Services, May 19, 1978, at 4.

In accordance with this restatement of the Postal Service's position, the Service characterized the Docket No. R77-1 costing approach in its presentation to the Court of Appeals as a "rational implementation *of the NAGCP I interpretation,*" but did not argue the merits of that interpretation. Brief for the Appellee, Docket Nos. 78-1448 *et al.* at 24 (D.C. Cir. October 2, 1978) (emphasis supplied). In a later submission by the Solicitor General on behalf of the Postal Service to the United States Supreme Court the position of the Postal Service in Docket No. R77-1 was stated to be as follows:

> The Postal Service believes, contrary to the court of appeals, that the language and history of the Act demon-

strate that Congress envisaged only two types of postal costs: "attributable" costs, which are causally related to the service provided, and all other costs, which are to be "assigned" to classes of mail on a reasonable, value-of-service basis, determined by the non-cost factors of Section 3622(b). The court of appeals has held that, after attributable costs are allocated, remaining costs that can "reasonably" be assigned to various mail classes, on a cost-of-service basis are to be so assigned on a value-of-service basis in accordance with the non-cost factors of section 3622(b)(3).

[R. 24125] Although the Postal Service complied with the three-cost configuration in the present case, it continues to believe that the result of such compliance will deprive it and the Commission of the pricing flexibility that Congress intended them to have when it specified, in Section 3622(b), eight non-cost factors for the Commission to consider in addition to the cost factors of 3622(b)(3). The Postal Service believes that this loss of flexibility will make it difficult to provide the public with diverse postal services at reasonable rates, as Congress intended.

Brief for the Respondent in Opposition, Docket Nos. 79-377 *et al.* at 9-10 (S. Ct. Dec. 11, 1979) (footnote omitted).

Thus, it is apparent that the Commission and the Postal Service have both expressed their strong disagreement with the basic tenets of the *NAGCP* I decision, and stated their belief that their efforts to properly formulate postal rates have been thwarted by it. The Postal Service here restates these previously expressed positions. It should reasonably be expected that the present Commission, and especially the three current members who joined in the cited portions of the Commission's Docket No. R77-1 Opinion, also still adhere to the Commission's views consistently presented in the past.

[R. 24126] III. THE POSTAL SERVICE'S FILING PERFORCE REFLECTS A THREE-COST CONFIGURATION

As we have said, it is the Postal Service's position that the *NAGCP* I interpretation of section 3622(b) was wrong in identifying and requiring three types of postal costs, *i.e.*, attri-

butable, reasonably assignable, and institutional. Nevertheless, it remains the prevailing interpretation and was recognized as such by a different panel of the same court in *NAGCP* III. Our filing in this docket perforce, therefore, reflects the three-cost interpretation.

Reinforcing this was the Postal Service's desire to avoid the possibility of action being taken by parties or by the Commission which would seek rejection of the filing by the Commission on substantive grounds. This possibility was recently raised in the Commission's notice of proposed rulemaking to amend rules 56 and 66 of its rules of practice and procedure, 39 C.F.R. §§ 3001.56, 3001.66, 45 Fed. Reg. 11,139, 11,140 (1980), which significantly cited *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), a Supreme Court decision that concerned rate review procedures rather than ratemaking or rate changing procedures. The potential for rejection—albeit illegal—of the Postal Service's filing on substantive grounds was also raised by the Commission in Docket No. MC78-1. There, in its Order No. 380 (May 18, 1979), the Commission offered [R. 24127] opinion that rejection of a Postal Service request was an available "remedy" under the statute despite the fact that the proceeding had been under way for well over eight months and, significantly that no participant had even raised the matter. Thus, the Postal Service wanted to eliminate any potential for the parties to file motions—or for the Commission *sua sponte* to take action—seeking rejection on the basis of substantive failure to comply with the prevailing interpretation of postal costing methodology under section 3622(b)(3) in the D.C. Circuit. [2]

---

[2] The prevailing interpretation, of course, is subject to change under a number of scenarios, some of which, admittedly, are unlikely to occur. One scenario for upsetting the current three-cost interpretation would take place if the Commission, in this proceeding, returned to the two-cost ratemaking approach used in Docket Nos. R71-1, R74-1 and R76-1, the Governors adopted the Commission's

[R. 24128] We note in passing that rejection of a Postal Service filing on substantive grounds by the Commission would be patently illegal under the statute and under the Commission's regulations. The reasons why the proposed amendments to rules 56 and 66 of the Commission's rules of practice would unlawfully step beyond the bounds of the Commission's statutory authority are discussed in Comments of the United States Postal Service in Response to Postal Rate Commission Notice of Proposed Rulemaking, March 12, 1980, at 2-6, 11-16, 25-31, 35-39.

[R. 24129] IV. THE TWO-COST INTERPRETATION OF SECTION 3622(b) IS THE CORRECT ONE

The spontaneous, unconstrained, and contemporaneous interpretation of the ratemaking provisions of the Act by the two postal agencies, the Postal Rate Commission and the United

---

recommended decision based on this approach, and none of the participants in this docket sought judicial review. This scenario is admittedly implausible for several reasons, not the least of which is that there has been a legal challenge to every rate proceeding since postal reorganization.

Another possible event which could upset the prevailing interpretation of the required types of Postal Service costs would involve the Court of Appeals *en banc* reversing its panel in *NAGCP* I. This possibility is also remote. As the *NAGCP* III court stated with restraint: "If we were convinced *NAGCP* I was fatally flawed, our recourse would lie in a request for en banc consideration. We do not initiate that course." 609 F.2d at 402 n.23.

The least implausible way in which the prevailing interpretation might be overturned is reviewed by the Supreme Court. This assumes that the Supreme Court would grant a petition for writ of *certiorari* after the court of appeals once again had upheld the *NAGCP* I approach and it further assumes, of course, that the Supreme Court would then reject that approach.

States Postal Service, that there are two kinds of postal costs, is the correct one. The language of the statute, its legislative history, and public policy all favor the postal agencies' two-cost interpretation.

The postal agencies have consistently interpreted the Act correctly. The Act requires the Postal Service to allocate postal costs to classes of mail and types of services in two—and only two—steps: first, it must allocate those costs that are "attributable" either directly or indirectly, that is, costs that are causally related to the service provided, to a class of mail or type of service; and second, it must make a reasonable assignment among classes of mail of all other costs on the basis of the non-cost factors of section 3622(b). This interpretation gives full effect and meaning to all of the Congressionally mandated ratemaking factors, including the non-cost factors. If, on the other hand, the cost-of-service principles are overemphasized, these non-cost factors become meaningless.

The postal agencies' unconstrained interpretation recognized the plain meaning of the statute. The notion that Congress [R. 24130] intended a third category of costs more tenuously related to the classes of mail than direct and indirect attributable costs is simply not within the language of the statute. The statute does not speak of "extended attribution" nor does it speak of the "extended use of cost accounting principles." These concepts have been wrongly overlaid upon the statute by the court of appeals.

The postal agencies' unconstrained interpretation is also supported by the statute's legislative history. To fully understand Congress intent in the ratemaking section of the statute, one must begin with the Kappel Commission Report, which criticized the old Post Office Department and provided a conceptual foundation for the 1970 Act.

The Kappel Commission strongly faulted the Post Office Department for its attempt to allocate all postal costs to the various classes and subclasses of mail according to cost accounting and cost-of-service principles.

> A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary but uninformative.

Towards Postal Excellence, The Report of the President's Commission on Postal Organization (Kappel Commission Report) at 30 (1968).

[R. 24131] The Kappel Commission recommended that the Postal Service determine for each class of mail the long-run variable costs, those costs which vary with changes in mail volume and which represent the costs caused by the particular class of mail. The Kappel Commission went on to recommend that postal rates for each class of mail be set to cover variable costs plus an appropriate share of all other costs based on market and demand considerations. Kappel Commission Report at 131-32.

Both the original House and Senate bill endorsed the Kappel Commission approach and rejected fully allocated costs. The bill that eventually passed the House established a rate floor similar to the Kappel Commission's concept of variable costs. H.R. 17070, 91st Cong., 2d Sess. (1970) § 1201(c). Although the Senate Bill (S. 3842) did not establish a similar rate floor, the Senate Committee report on this bill stated that the Committee rejected a fully allocated cost approach using arbitrary cost accounting formulas. S. Rep. No. 91-912, 91st Cong., 2d. Sess. 17 (1970). The Senate bill required only that the rate commission consider all costs "properly assignable" to each class of mail and several non-cost factors. *Id.* § 3704(g).

In the final House-Senate compromise, the House's minimum rate floor prevailed. 39 U.S.C. § 3622(b)(3). The non-cost criteria of S. 3842 were also included. 39 U.S.C. §§ 3622(b)(1), (2), (4)-(8). The Congress thus adopted and implemented the [R. 24132] concepts of variable costs and of demand pricing advocated by the Kappel Commission. In sum, the statute's legislative history demonstrates a commitment to the idea that

postal rates for each mail class should recover that class' attributable, *i.e.*, variable costs, and that all other costs should be allocated or assigned on the bases of non-cost criteria.

The Postal Service believes that the two-cost configuration intended by Congress better serves public policy than the three-cost configuration of *NAGCP* I.

The two-cost configuration encourages the most efficient use of postal resources and permits the lowest possible rates for all mailers. To the degree that non-volume variable costs, or any part of them, are arbitrarily allocated on the basis of other than non-cost factors among various classes of mail, the process of attracting sufficient mail volumes to maintain efficient operations is impeded. It is by giving appropriate effect to the demand-oriented non-cost factors that the Postal Service can lower postal rates for all postal users by increasing volumes and spreading institutional costs over larger volumes.

The two-cost configuration independently adopted by the postal agencies also permits them to give effect to important policy goals enunciated by Congress. These goals are specified [R. 24133] among the non-cost ratemaking factors. They include the fostering of the "educational, cultural, scientific, and informational value to the recipient of mail matter," moderation of the impact of steep price rises on the public, and encouragement of worksharing by mailers. 39 U.S.C. §§ 3622(b)(8), (4), (6). If ever-greater extended attributions are pursued, the postal agencies will lose the ability to give effect to such important policies.

There is very real danger that the extended attribution, three-cost interpretation proclaimed in *NAGCP* I will push both postal agencies into the fully allocated system responsible for many of the failings of the old Post Office Department. As more and more postal costs are allocated on the basis of cost accounting principles the Commission will be deprived of its ability to use its experience and judgment to weigh demand and policy considerations. Its *raison d'etre* will cease to exist, and postal ratemaking will revert to being simply an account-

ing exercise. In such a situation the mailing public will suffer no less than the Commission and the Postal Service.

In sum, the Postal Service believes it to be clear that the postal agencies' unconstrained interpretation of section 3622(b) as identifying only two kinds of postal costs was correct, and that it properly reflected the intent of Congress as explicitly stated in the Act. Concomitantly, we believe that the *NAGCP* I dicta misinterpreted the Act and distorted its plain language, and that it disserved the public interest by imposing an erroneous and inferior costing methodology on the agencies.

[R. 24134]

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

/s/ FRANCES G. BECK
Frances G. Beck
Assistant General Counsel

/s/ WILLIAM L. FANG
William L. Fang

/s/ GRADY B. FOSTER
Grady B. Foster

/s/ DANIEL J. FOUCHEAUX, JR.
Daniel J. Foucheaux, Jr.

/s/ SUSAN M. DUCHEK
Susan M. Duchek

/s/ GERALD J. ROBINSON
Gerald J. Robinson

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260
May 19, 1980

[R. 24135]

SUMMARY OF ESTIMATED TEST YEAR FINANCES
(Dollars in Thousands)

Line	Description	Docket No. R77-1 Full Rates: Attributable Assignable Costs	Revenues [1] [2]	Percent of Costs	Revenue Contribution To Other Costs
	(1)	(2)	(3)	(4)	(5)
1	First-class mail	$ 8,241,290	$10,495,474	127.35%	$ 2,254,184
2	Priority mail	463,117	617,124	133.25	154,007
3	Express mail	141,637	295,326	208.51	153,689
4	Mailgrams	4,273	20,547	480.87	16,274
5	Second-class mail				
6	In county	48,228[3]	56,307	116.75	8,079
7	Outside county				
8	Nonprofit	173,938[3]	187,177	107.61	13,239
9	Classroom	4,335[3]	4,604	106.21	269
10	Regular-rate	350,191	467,905	133.61	117,714
11	Transient rate	11,396	5,543	48.64	– 5,853
12	Total	588,088	721,536	122.69[4]	133,448
13	Controlled circulation	174,622	271,565	155.52	96,943

Line	Description	Docket No. R77-1 Full Rates			
		Attributable Assignable Costs	[1] [2] Revenues	Percent of Costs	Revenue Contribution To Other Costs
	(1)	(2)	(3)	(4)	(5)
14	Third-class mail				
15	Single piece	341,007	206,946	60.69	−134,061
16	Bulk-rate regular	1,487,325	2,047,343	137.65	560,018
17	Bulk-rate nonprofit	493,527[3]	523,813	106.14	30,286
18	Total	2,321,859	2,778,102	119.65[4]	456,243
19	Fourth-class mail				
20	Parcels	347,403	405,888	116.83	58,485
21	Bound printed matter	29,645	62,057	209.33	32,412
22	Special rate	228,543	269,805	118.05	41,262
23	Library rate	57,677[3]	53,871	93.40	− 3,806
24	Total	663,268	791,621	119.35[4]	128,353
25	Federal government mail	363,829	721,088	198.19	357,259
26	Free-for-the-blind, etc.	9,935	—	—	− 9,935
27	International mail	764,722	620,233	81.11	−144,489
28	Special services	656,590	742,985	113.16	86,395
29	Other income	—	76,591	—	76,591
30	Other costs[5]	135,713	—	—	−135,713
31	Attributable/assignable costs and revenues	14,528,943	18,152,192	124.94	3,623,249

[R. 24135]

SUMMARY OF ESTIMATED TEST YEAR FINANCES—*Continued*
(Dollars in Thousands)

Line	Description	Docket No. R77-1 Full Rates			
		Attributable Assignable Costs	[1] [2] Revenues	Percent of Costs	Revenue Contribution To Other Costs
	(1)	(2)	(3)	(4)	(5)
32	Total other costs	9,574,665	—	—	-9,574,665
33	Investment income	—	73,155	—	73,155
34	Appropriations:				
35	Public services	—	692,898	—	692,898
36	Continuing	—	295,106	—	295,106
37	GRAND TOTAL	$24,103,608	$19,213,351	79.71%	-4,890,257

[R. 25715]
Before the
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes, 1980: Docket No. R80-1

DIRECT MAIL/MARKETING ASSOCIATION, INC.
MOTION FOR AN OPPORTUNITY TO CROSS-EXAMINE
A MEMBER OF TOP USPS MANAGEMENT
CONCERNING THE APPLICATION
OF PRICING FACTORS

At the close of his cross-examination of Postal Service witness Don S. Allen, counsel for Direct Mail/Marketing Association, Inc. ("DMMA") moved that this Commission enter an order requiring that Postal Service officials Edward McCaffrey and James Finch be required to take the stand in this proceeding and submit to oral cross-examination on the subject matter of Mr. Allen's testimony (Tr. 12/3855).

Having reviewed the transcript of witness Allen's testimony, DMMA remains convinced that, in order to permit an understanding of the Postal Service's approach to rate design in this proceeding, it is imperative that a member of top USPS management who is thoroughly familiar with the USPS's reasoning in all its facets, legal, economic of otherwise, submit to oral cross-examination on the following matters:

1. To explain the USPS approach to rate-making in this proceeding, including the apparent inconsistency between abandoning service-related [R. 25716] costs and failing to utilize price elasticity as a significant measure of value of service; and

2. To identify the principle or principles that justify the cost coverage proposed for third-class bulk regular mail.

Because it is not clear from the record which individual would be qualified to address these issues, DMMA hereby amends its oral motion so as to permit the Postal Service to choose the appropriate official.

ARGUMENT

Several times during his cross-examination, witness Allen candidly stated that constraints were placed upon him in developing his rate proposals. For example, the Board of Governors determined that the first-class rate for the first ounce should be twenty cents (Tr. 12/3834) and that the discount for presorted first-class mail should be three cents.(*Id.*)

More importantly, the Postal Service has abandoned the concept of service-related costs introduced in R77-1, and yet it has failed to return to the use of the Inverse Elasticity Rule or other demand-related benchmarks utilized in R76-1 and prior rate proceedings. As a result, a very large amount of institutional costs, $8.4 billion, the [R. 25717] largest in any rate case to date, has been distributed in accordance with a judgmental process that is the most unstructured in the history of these proceedings. [1]

Moreover, to the extent the judgmental process was described by witness Allen, it applies the various pricing factors of Section 3622(b) in a manner contrary to established precedent. For example, witness Allen's evaluation of the "value of service" factor gave relatively little importance to relative elasticities of demand (Tr. 12/3785-86). This approach is contrary to positions taken by the Postal Service and approved by this Commission in prior proceedings. [2]

---

[1] Indeed, Witness Allen admitted in response to DMMA Interrogatory No. 18 that the Commission could not "independently reconstruct the derivation of that distribution of institutional costs" (Tr. 12/3738; *see also* Tr. 12/3832).

[2] *E.g.*, Docket Nos. R74-1, PRC Op. 150-51; Docket No. R76-1, PRC Op. 119-121. The extent to which this Commission considered sensitivity to price increases in determining value of service in Docket R77-1 is not completely clear, but it apparently was not an insignificant factor. *See* Docket No. R77-1, PRC Op. 158.

Witness Allen admitted that the proposed cost coverage was not in "full agreement" with the Commission's decision in R77-1 (Tr. 12/

[R. 25718] For various reasons, witness Allen was unable to provide any useful explanation on these points; they were "constraints" placed upon him by others.[3]

According to USPS counsel, the decision to abandon service-related costs was made "at all levels, including the highest, of Postal Service management" (Tr. 12/3839).

According to witness Allen, legal constraints were imposed on the use of the Inverse Elasticity Rule and "there is great a deal of doubt in using the price elasticities to structure the markups" (Tr. 12/3839-40; *see also* 12/3785-88).

If such doubt exists, then doubt also exists as to the validity of the USPS reason for seeking to abandon service-related costs. The Postal Service has objected to the service-related cost methodology, claiming a desire to use "demand-oriented, non-cost factors" in setting rates.[4] Witness Allen has now testified that the Postal Service has doubts as to whether it can use demand-oriented, non-cost factors.

[R. 25719] What is the USPS position? Why should price elasticity suddenly be relegated to a relatively insignificant role as a measure of value of service? On what basis did the Postal Service determine to propose a cost coverage of 175% for third-class bulk regular mail?

3735). He stated that he would have preferred to give more weight to elasticity of demand (Tr. 12/3840) and that if he had, the proposed cost coverage for third-class bulk mail would have been lower (Tr. 12/3798).

[3] The Presiding Officer sustained a USPS objection when counsel for DMMA sought information concerning the views expressed by Mr. Allen's superior, Edward McCaffrey. (Tr. 12/3854). It is respectfully submitted that the objection was not proper. In some respects, Mr. Allen may have stated the views of top management, but no such views were stated on the reasons for the "constraints."

[4] *See* USPS Memorandum dated May 19, 1980 on the subject of service-related costs; *see also* Tr. 12/3747.

If the Postal Reorganization Act of 1970 stands for anything, it stands for the proposition that rates should be determined in the open, based upon a hearing on the record — and not in smoke-filled rooms, whether in the Congress or at the Postal Service.

The Act also stands for the proposition that rates should be based on identifiable cost and the reasoned application of certain specific, enumerated factors, Witness Allen, as able a witness as he may have been, was simply not able to explain, in many critical respects, how the Postal Service applied the various pricing factors. Not only did the Postal Service fail to use the pricing principles that it has in the past, but the current record leaves the actual pricing rationale shrouded in obscurity. It is critical that the parties be given a chance to inquire into the bases of this process.

WHEREFORE, DMMA hereby moves this Commission for an order requiring an appropriate USPS official to [R. 25720] appear on the stand and submit to oral cross-examination on the issues set forth above.

Respectfully submitted,

/s/ DAVID K. FLYNN
Dana T. Ackerly
Edward T. Mackiewicz
David K. Flynn

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20036

Counsel for Direct Mail/
Marketing Association, Inc.

August 13, 1980

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in accordance with Section 12 of the Commission's Rules of Practice.

/s/ DAVID K. FLYNN
David K. Flynn

August 13, 1980

[R. 25841]
Before the
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes, 1980: Docket No. R80-1

RESPONSE OF THE UNITED STATES POSTAL SERVICE TO DIRECT MAIL/MARKETING ASSOCIATION, INC. MOTION FOR AN OPPORTUNITY TO CROSS-EXAMINE A MEMBER OF TOP UNITED STATES POSTAL SERVICE MANAGEMENT CONCERNING THE APPLICATION OF PRICING FACTORS

On August 13, 1980, the Direct Mail/Marketing Association, Inc. (DMMA) requested this Commission to require "an appropriate" member of high Postal Service management to submit to oral cross-examination on the subject matter of witness Allen's testimony. Specifically, DMMA raises the following two matters concerning which it seeks to question Postal Service management:

1. To explain the USPS approach to ratemaking in this proceeding, including the apparent inconsistency between abandoning service-related costs and failing to utilize price elasticity as a significant measure of value of service, and

2. To identify the principle or principles that justify the cost coverage proposed for third-class bulk regular mail.

DMMA Motion at 1-2. The Postal Service hereby responds.

There is no need for an additional member of Postal Service management to testify in this proceeding. The Postal Service's approach to ratemaking was adequately explained both in the [R. 25842] testimony and cross-examination of witness Allen. The reason the Postal Service has not used service-related costs is explained in the Postal Service's legal memorandum filed May 19, 1980. The principles used to determine the cost coverage for third-class mail are described in Mr. Allen's testimony.

DMMA's motion fails to establish a single reason why an additional Postal Service witness is necessary. Although DMMA, in its motion, lists several issues that it *asserts* require the additional explanation of a member of Postal Service management, not one of these issues concerns a matter that could be explained better than it has been by a member of management. This is because witness Allen is the spokesman for the Postal Service and his views represent those of Postal Service management.[1] Tr. 12/3853-4, 3857. Indeed, in sustaining a Postal Service objection, the Presiding Officer found that because Mr. Allen presents the views of all Postal Service management, it was not relevant or necessary to determine the individual views of Mr. Allen's immediate superior, Mr. Edward J. McCaffrey [2] Tr. 12/3853-4.

[R. 25843] Moreover, to a large extent, DMMA's list of issues merely presents DMMA's arguments and positions in this proceeding. DMMA will have ample opportunity to argue these positions in its brief. The fact that DMMA may disagree with some positions which the Postal Service has adopted is not a reason for the Postal Service to present an additional witness.

DMMA argues that Mr. Allen cannot explain the constraints placed upon him by the Governors of the Postal Service.[3]

---

[1] This proceeding will become unnecessarily complex and unwieldy if every person who advised witness Allen on pricing policy must be presented as a witness. It is good procedure and simple common sense to appoint a single spokesman to represent the views of all the members of management who had input into the pricing decisions witness Allen presents. As Postal Service counsel stated, witness Allen is the spokesman for Postal Service management. Tr. 12/3857.

[2] It is inappropriate for DMMA to, in effect, attempt to circumvent the Presiding Officer's ruling by the instant motion.

[3] DMMA also incorrectly assumes that postal management placed "constraints" on witness Allen. The "constraints" Allen described in his testimony and on cross-examination were placed upon him by the Governors, not postal management. Testimony of Don S. Allen, USPS-T-10 at 4 and Tr. 12/3834.

DMMA assumes that a member of Postal Service management will be able to better explain the reasons for the Governors' constraints. This is a false assumption. The Governors are an independent body. No member of Postal Service management, no matter how highly placed, can testify to the thought processes of the Governors. The Governors' reasons, opinions, and thoughts are not necessarily those of postal management.

DMMA also argues that the Postal Service has not explained why it has abandoned service-related costs and not adopted its former quantitative application of the inverse elasticity rule. DMMA implies that an additional witness is necessary to address [R. 25844] these matters. No additional witness is necessary because these are matters concerning legal interpretations of the Postal Reorganization Act rather than factual matters for a witness to comment on and the Postal Service has explained its legal position in its memorandum of May 19, 1980. In an attempt to justify its request for an additional witness, DMMA seems to assume that the Postal Service must use *either* its former service-related costing methodology or the inverse elasticity rule to distribute non-attributable costs. Congress did not specify particular costing methodologies, nor did it specify procedures for evaluating value of service. Congress merely prescribed criteria to be used. Witness Allen has testified how he applied those criteria. The record is abundantly clear that Mr. Allen's application of the ratemaking criteria of the Postal Reorganization Act had the full approval of and was the result of input by the higher levels of postal management.

DMMA states that witness Allen has testified that "the Postal Service has doubts as to whether it can use demand-oriented, non-cost factors." DMMA Motion at 4. DMMA mischaracterizes Mr. Allen's testimony. Mr. Allen merely stated that the Postal Service doubts that it can utilize the inverse [R. 25845] elasticity rule in the same manner in which it was previously used. Tr. 12/3787. Witness Allen has individually considered all the non-cost factors—as well as the cost factors—enumerated in the Act. Tr. 12/3787. He has applied

them in the manner described in his testimony. DMMA may take exception to witness Allen's results, but it is simply incorrect when it says that Allen's methodology is obscure.

DMMA also disagrees with the relative weight the Postal Service has given to price elasticities in determining the value of service for third-class bulk mail. If DMMA believes that this is either an improper legal interpretation or an improper application of the statutory criteria, it may argue so on brief.

In short, there is no need for an additional Postal Service witness. Witness Allen, as a spokesman for Postal Service management, has fully explained Postal Service pricing policy. DMMA has only shown that it may have different legal and/or quantitative interpretations and positions from those taken by the Postal Service. It has certainly not established the need for another pricing policy witness.

[R. 25846] WHEREFORE, the Postal Service hereby moves this Commission to deny DMMA's motion requesting a member of Postal Service management to submit to oral cross-examination.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Frances G. Beck
Assistant General Counsel

/s/ GERALD J. ROBINSON
Gerald J. Robinson

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.

Frances G. Beck

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260
August 25, 1980

[R. 25955]
UNITED STATES OF AMERICA
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268

Postal Rate and Fee Changes, 1980: Docket No. R80-1

PRESIDING OFFICER'S RULING DENYING MOTION TO CALL MEMBER OF POSTAL SERVICE MANAGEMENT TO SUBMIT TO CROSS-EXAMINATION

(September 10, 1980)

On August 13, 1980, Direct Mail/Marketing Association, Inc. (DMMA) moved for the Commission to issue an order requiring a member of Postal Service management to submit to oral cross-examination on the following subjects:

1) The Postal Service rate making approach insofar as it involves "the apparent inconsistency between abandoning service-related costs and failing to utilize price elasticity as a significant measure of value of service," and

2) The principles employed to develop the proposed cost coverage for third-class bulk regular mail.

In support of its motion DMMA states that the Postal Service's rate design witness, Don S. Allen, was unable to explain the reasoning behind the Postal Service's proposals in the two aforementioned areas. DMMA argues that without a witness who can fully explain the decisional process leading to the Postal Service [R. 25956] proposals in these two areas the record is "shrouded in obscurity" preventing the parties from conducting meaningful cross-examination. [1]

On August 25, 1980, the Postal Service filed its response in opposition to DMMA's motion. The Postal Service argues that

---

[1] Direct Mail/Marketing Association, Inc., Motion For An Opportunity to Cross-Examine A Member of Top USPS Management Concerning the Application of Pricing Factors, August 13, 1980, p. 5.

through (1) the testimony of its witnesses, and (2) in a May 19, 1980 memorandum filed in response to a presiding officer's request, it has fully explained the reasoning which led it to abandon service-related costs while at the same time not relying upon price elasticity in developing proposed rates. As to DMMA's claim that the principles employed to determine the proposed cost coverage for third-class are obscure, the Postal Service argues that witness Allen has fully explained the factors leading to his recommended cost coverage. The Postal Service continues that to call additional witnesses from management would be fruitless "because witness Allen is the spokesman for the Postal Service and his views represent those of management." (footnote omitted)

Before directing a party to submit a witness for oral cross-examination, there must be a *prima facie* showing that the witness sought to be called has facts peculiarly within his knowledge which are relevant to a material issue in these proceedings. Furthermore, [R. 25957] these facts must be of a kind that no other witness appearing before the Commission on behalf of the party to whom an order is requested—in this case the Postal Service—is competent to testify on the subject area. DMMA has not met this burden and thus its motion is denied.

As indicated above, the Postal Service states in its response that no member of management could better explain the reasoning underlying the Postal Service's proposals on the two subject areas. According to the Postal Service, Allen being spokesman for management, has already expressed the views of management. DMMA has not made any showing that suggests that this assertion is invalid. Nor do I perceive any reason to believe that calling upon a member of Postal Service management to submit to cross-examination would enhance the record on these specific points. [2]

---

[2] Of course, in the rate and classification area, a management policy decision, unsupported by reasoning and analysis, normally will not be sufficient to meet the Service's burden of persuasion on fact-related issues.

With regard to the Postal Service's determination not to use service-related costs of price elasticity in developing its proposed rates, witnesses Alenier and Allen have attempted to explain the Postal Service's reasoning.[3] Additionally, in its memorandum of May 19, the Postal Service sheds further light as to its position.[4] Whether the Postal Service's position is adopted by [R. 25958] the Commission will, of course, depend upon the Commission's assessment of the record. Recognizing that the burden of proof lies with the Postal Service, to the extent DMMA believes that the Postal Service has not met its burden, DMMA has the opportunity to rebut the Postal Service's arguments and evidence by brief or through testimony of its own witnesses.

Similarly, witness Allen has explained the factors considered in determining the proposed cost coverage for third-class mail.[5] Again, to the extent DMMA believes that the Postal Service has inadequately supported its position, DMMA can address these matters in brief or through testimony of its own witness.

IT IS ORDERED

Direct Mail/Marketing Association's motion for an opportunity to cross-examine a member of Postal Service management is denied.

/s/ LEE FRICSCHLER
A. Lee Fricschler, Chairman
Presiding Officer

---

[3] *See* for example Tr. 18/6356 *et. seq.*

[4] Memorandum of the United States Postal Service, May 19, 1980.

[5] *See* for example Tr. 12/3714 *et. seq.*

costs are obviously not fixed with respect to changes in service standards. Service-related costs are caused by the creation of a separate service standard for certain preferred classes of mail. A change in that service standard would cause a change in those costs.

[0347] A "truly" fixed cost—that is, one that simply cannot be attributed or assigned—would appear to be one that is both fixed with respect to volume and fixed with respect to any other mail characteristics. Such costs appear to us to be incapable of being causally related to classes of mail, and as such properly belong in the category of residual costs, which are recovered through the pricing process. However, the meaning of fixed as "fixed with respect to changes in volume" seems too well-established to change. We think it best to continue to use the word "fixed" in its traditional sense. Just as variable means variable with volume, the word fixed, standing alone, will continue to mean fixed with respect to volume. As such, it will not be synonymous with residual costs, which we define in the next section.

g. Distinction Between "Attributable," "Assignable," and "Residual"

[0348] In R77-1 the Commission required a cost to be volume variable, either in the short run or longer run, in order to be considered attributable. The Commission believed that the only clear distinction between attributable and assignable costs was the distinction between variable costs and other causally related costs. The court of appeals accepted this distinction in the specific context of its review of R77-1. We would add another reason for treating variable costs as attributable and other causally related costs as assignable. A volume-variable cost carries its own distribution key with it; a cost that is related to some other mail characteristic does not. Such a

cost cannot automatically be distributed to classes of mail in proportion to its causally related mail characteristic. As a result, there is likely to be more dispute over, and less precision in, the allocation of costs that are not volume variable than will be the case with volume-variable costs.[1] This situation seems to correspond with the *NAGCP I* concept of a distinction between cost allocations that are more or less "speculative" in nature.[2] As such, we think there is a clear basis for treating costs that are causally related to mail characteristics other than volume as reasonably assignable costs.

[0349] *NAGCP I* also requires "extended" attributions. The word "extended" implies the existence of a starting point from which one extends. The starting point to which the court in *NAGCP I* referred was "cost variability."[3] The cost variability theory under discussion in *NAGCP I* was the short-run variable cost theory reluctantly adopted by the Commission in R74-1.

[0350] The volume-variable costs identified in the current proceeding clearly extend well beyond those identified in R74-1. Not only is the level of variable costs in this case 64.16 percent (compared with 52.5 percent in R74-1), but we have explicitly declined the invitation to impose a specific time limit on longer-run costs. We have also noted that we do not impose a limit on the size of the increment of volume that may be hypothesized when investigating the variability of costs with volume.[4] Such a limit had been part of the short-run cost

---

[1] As the Commission has previously stated, PRC Op. R76-1 at 105, "An inquiry into distribution keys requires the same degree of careful analysis as the search for variable costs. And such an inquiry may result in the same type of divergent opinion as that surrounding the accounting allocation of costs we criticized in our prior Opinion . . . ."

[2] 569 F.2d at 587 n.59.

[3] *Id.* at 590.

[4] *See* para. 0343, *supra*.

theory utilized in R74-1. We conclude that the definition of variability adopted in this case, and the results achieved using it, constitute a proper application of the requirement for extended attribution. [5]

[0351] There remains the question of what constitutes a residual cost. We see two types of cost that qualify for this category. First are the "truly" fixed costs, *i.e.*, those costs that cannot be causally related to mail volume or any other mail characteristic. Second are costs which may be causally related to some characteristic of mail other than volume but for which no suitable distribution key can be found. We have not been presented with any such costs in this case, but we would be overly optimistic if we did not note the possibility of their existence. The parties should be aware that (we will not create a distribution key for them.) Nor will we adopt a distribution key for the purpose of reasonably assigning costs if we cannot see a logical connection between the distribution key proposed, the cost to be distributed, and the mail characteristic that has given rise to an inference of a causal relationship. [6]

---

[5] The court of appeals stated the requirement for extended attributions in the context of criticizing the Commission for its insistence on "utmost accuracy in the measurement of causation . . . ." 569 F.2d at 591. It might be argued that our stress on definitions of such terms as "volume," "mail characteristic," "functional cost element," and "causal connection" again indicates an unacceptable preference for "utmost accuracy." We believe that circumstances are now radically changed. We have clearly extended our attributions. We have reasonably assigned a significant portion of non-attributable costs on a cost-of-service basis. Having met these basic requirements of the Act, we are certainly entitled, and may indeed be required, to press the participants in our proceedings to provide the best, the most precise, the most accurate analyses of cost causation of which they are capable.

[6] The reallocation of certain mail processing peak-load costs has brought this problem to our attention. See paras. 0381, 0390, *infra*. Witness Merewitz proposed a distribution key based on relative

B. Postal Service Proposals to Change R77-1 Costing Procedures

[0352] The Postal Service has proposed numerous changes in the ways the Commission attributes and assigns costs. In the sections to follow, we will examine some of these proposals in detail. Proposals not discussed here are discussed in Appendix J. The following table summarizes the Postal Service's proposals and our disposition of them.

---

piece arrival rates during a three-hour peak period. Witness Haldi proposed a distribution key based on relative day-to-day fluctuations in arrival rates. Given the costs witness Merewitz had measured, the latter distribution key was logically the one to use. But data deficiencies rendered it unsatisfactory. In the case of peak-load costs, the costs involved are volume variable and therefore attributable whether we adopt one of the proposed distribution keys or not. But we perceive the possibility of the same situation arising in the future with a reasonably assignable cost. If that happened, there would be no "natural," *i.e.*, volume-related, distribution key to fall back on, and we would be forced to treat the cost, for the time being, as residual—recognizing that correction of the deficiencies in the data would be not merely desirable but absolutely required.

correct the error.[7] We recognize that our correction of this error on the basis of incomplete information has undoubtedly introduced new, but smaller, errors. Therefore, we are directing the Service to include in its next filing for general rate changes a distribution of attributable and assignable costs that follows exactly the procedures for distributing costs adopted in this Opinion. In particular, the Service will be expected to distribute "other" administrative clerks in a way that follows exactly the distribution we have performed in Appendix J. The Service may, of course, like any other participant, propose improvements in the distributions we adopt in this case. But the days when the Postal Service may unilaterally alter costing procedures adopted by the Commission are over.

C. Alternative Costing Approaches

[0444] Only one participant in this proceeding, the OOC, presented what can be called an overall alternative approach to costing. Numerous parties presented alternative proposals for allocating (or not allocating) the costs of individual components. But for the most part these parties purported to follow the basic costing theory presented by the Postal Service in this proceeding or the theory adopted by the Commission in R77-1. Their proposals dealt with details of application, not with basic costing philosophy.[8] We evaluate their proposals in the con-

---

[7] *See* Rhode Island Consumers' Council v. FPC, 504 F.2d 203, 212 (D.C. Cir. 1974):

> [An] agency cannot reasonably be expected to take a hard look unless the parties participate in the task of identifying hard problems, and of bringing to light pertinent information and analysis bearing on their resolution.

[8] As we have indicated above, we do not accept or reject proposed cost allocations on the basis of the theory or philosophy espoused. We analyze each proposal relating to a particular functional cost component for the purpose of identifying viable inferences of cost causation. *See generally* Appendix J.

text of the individual cost components to which they apply. NAGCP proposed allocating all residual costs in proportion to any number of "objective" bases. But the NAGCP proposal was offered as a pricing scheme, not as an analysis of cost causation, and we will not discuss it here. We have had occasion earlier in this Opinion to describe briefly the OOC's approach to costing in this case. There is really little to add, but we will repeat the description here.

1. Summary of OOC Costing Approach

[0445] According to the OOC, the costs of the Postal Service consist of two types: operating costs and administrative costs. The OOC treats operating costs as attributable or assignable; he treats administrative costs as residual. The decision to equate operating costs with attributable/assignable costs was essentially a legal decision not an analytical one. Witness Robertson referred to the *NAGCP I* decision where the court of appeals, in discussing the legislative history of the Postal Reorganization Act, said that Congress might have intended that attributable costs be operating costs. [9]

[0446] *Isolation of operating costs.* In order to separate operating costs from administrative costs, witness Robertson turned to a document prepared by Postal Service witness Dalton. That document assigns all the cost components to four functional operations: (1) mail processing; (2) acceptance, collection, and delivery; (3) transportation; and (4) administration, miscellaneous overhead, and other. [10] After making several adjustments to this functional aggregation of cost components, [11] witness Robertson declared all costs in categories (1) through (3) to be operating costs.

---

[9] OOC-T-100 at 36.

[10] *See* USPS-8G, table 2.

[11] OOC witness Coberly shifted a significant amount of postmaster costs from category (4) to categories (1) and (2). See para. 0432, *supra*. Witness Robertson made several less significant adjust-

[0447] *Separation of assignable costs.* Witness Robertson categorized floor space costs as reasonably assignable. The basis for this was Robertson's belief that the *NAGCP* cases require that there be some assignable costs. Robertson stated that floor space costs are the least causally related to classes of mail of all operating costs. [12]

[0448] *Distribution of operating costs to classes of mail.* Witness Robertson testified as follows. [13]

> The Court has indicated that cost-allocation formulae should be the basis for cost distribution. Such formulae are designed to reflect relative cost responsibility for a particular functional service rendered. *Relative use of functional activities is the only reasonable way to measure and distribute cost responsibilities.* Relative use factors, *i.e.*, distribution keys such as pieces, cube, and weight, are measures of system output. Indirect costs may reasonably be distributed on the basis of distributed direct costs to which they relate.

Generally, witness Robertson distributed costs not attributed by the Postal Service in proportion to costs that were attributed by the Service. The only significant exception was the treatment of delivery network costs. Robertson distributed these costs in proportion to pieces and stops. [14]

---

ments, all but one of which had the effect of shifting costs from categories (1) and (2) to category (4). *Compare* USPS-8G, table 2 *with* OOC Compliance with Presiding Officer's Suggestion, October 21, 1980, at 1-4.

[12] OOC-T-100 at 36.

[13] *Id.* at 37 (emphasis added).

[14] OOC-T-100 at 39-43.

2. Commission Comment

[0449] The basic defect in the OOC's approach to costing is exemplified by the underscored sentence from the testimony of witness Robertson quoted above. That sentence reveals that Robertson did not begin to examine "cost responsibilities" or cost causation until after he had decided what costs to attribute. In terms of the cost attribution/assignment process described in a flow chart in the Commission's R77-1 opinion, [15] witness Robertson has proposed the existence of inferences of causation but has made no attempt to verify their existence. In terms of the six-step cost-allocation process described in this Opinion, witness Robertson has skipped from step (1), the identification of individual cost elements, to step (6), the distribution of costs to classes of mail, without addressing the possible existence of a causal connection between his functional costs and any characteristic of mail.

[0450] Witness Robertson testified that attributable costs are operating costs. This was a legal determination and involved no analysis of cost causation. Robertson then determined that operating costs are all costs other than administrative costs identified in Postal Service exhibit 8-G. Exhibit 8-G is not an analysis of cost causation. It is simply an assignment of all the Postal Service's cost components among four basic functional categories. Witness Robertson relied on labels such as "mail processing" rather than on any analysis of actual operations performed by employees whose costs appear in numerous distinct components and subcomponents under the heading "mail processing." [16]

---

[15] PRC Op. R77-1 at 89.

[16] Witness Robertson's determination of variability is even cruder than that presented by the OOC in R74-1. In that case the OOC's costing witness divided costs into direct, indirect, reasonably assignable, and institutional. R74-1, OOC-T-1 at 9. This classification was intended as an aid in determining the existence of causal rela-

[0451] Robertson's ability to find distribution keys that allocate his attributable/assignable operating costs to classes of mail cannot be taken as verification of the existence of a causal relationship. Distribution keys have an existence of their own, independent of causation. They are nothing more than mathematical formulae. Their use must be *preceded* by an analysis of causation. [7] The use of a formula to distribute costs cannot by itself establish or create a causal relationship.

[0452] The OOC costing presentation in this case was not based on cost causation. It was based on labels. Perhaps the most troublesome aspect of the OOC's costing approach was its lack of analytical content. The other parties to this case found themselves in the position of having nothing concrete to address. They were presented with little more than a table of allocations and forced to ask, over and over, why witness Robertson made particular allocations, with no useful response forthcoming.

[0453] We suggest that in the future all participants follow the six-step cost analysis we described near the beginning of this part of the Opinion. If the participants will do this, it will be

---

tionships. *Id.* at 11. Only after classification of a cost as direct, indirect, etc., did the OOC's R74-1 costing witness decide whether to distribute the cost on a cost-of-service basis. *Id.* at 9 n.2. Witness Robertson skipped this step, basing his determination of what costs should be distributed on a cost-of-service basis solely on his operational/administrative distinction.

[7] In R76-1 the Commission stated, PRC Op. R76-1 at 108 (emphasis in original), "We will continue to seek those costs that are variable with volume and thereby rationally relate costs to a unit of volume or 'distribution key' *before* attributing it to any class or service." Although we no longer require volume variability as proof of causation, we continue to require the establishment of causation on some basis *before* choosing a distribution key.

readily apparent what approach, if any, a participant is using to establish cost causation. [18] It should be clear from what we say above that cost presentations not explicitly addressing causation are likely to be given little if any weight.

D. Future Postal Service Filings

[0454] Our analysis of costing issues in this proceeding has been more difficult and time consuming than it has been in any previous case. Not only have we had to deal with the stale and simplistic proposal of the OOC, but we have had to evaluate innumerable, unilateral changes in costing procedures included in the Postal Service's initial filing. The Commission's staff has had to devote immense effort to

---

[18] If parties will also present their results in the standard cost segment/component format used by the Commission, much discovery time will be saved. Much time was wasted in this proceeding while parties attempted to obtain from the OOC a presentation of his costs that was comparable to the Service's.

[THIS PAGE INTENTIONALLY LEFT BLANK]

[Vol. I — p. 222]

SUMMARY OF PRC ATTRIBUTABLE/ASSIGNABLE COSTS
TEST YEAR AT PRC IMPOSED RATES
($000)

	Short Run											
	Variable	Specific Fixed	Longer-Run Variable	Total Attributed	Final Adjustments	Not Attributable	Service Related Cost	Special Delivery	Sub-Total	Assigned Contingency at 2.5%	Eliminate Assignment to Preferred Rate Classes and Other Adjustments	Grand Total
1st Cl.—Ltrs. & Sealed												
Parcels	5,274,679		1,134,706	6,408,885	2,850	6,411,735	1,069,432		7,481,167	187,030		7,668,197
Presort Letters	1,014,919		224,784	1,243,703		1,243,703	493,434		1,737,137	43,420		1,780,565
Govt. Postal Cards	14,830		3,864	18,694		18,694	8,982		27,676	692		28,368
Pvt. Post Cards	110,091		25,425	135,516		135,516	35,281		170,747	4,270		175,067
Presort Post Cards	24,897		5,338	30,235		30,235	15,094		45,329	1,133		46,462
Priority Mail	352,161		75,204	427,365	4,184	431,549	22,065		454,414	11,360		465,774
Express Mail	108,311		15,221	123,532		123,532	6,481	16,587	146,600	3,665		150,265
Mailgrams	3,546		777	4,323		4,323	780		5,103	129		5,232
2nd Cl.—Within County	45,127		13,507	58,634		58,634	18,342		76,976	1,924	(20,266)	58,634
Regular Rate	460,767		150,469	611,236		611,236	83,406		694,642	17,366	(30,826)	681,182
Nonprofit	149,930		44,989	194,919		194,919	3,132		198,051	4,951	(8,083)	194,919
Classroom	3,820		1,834	5,654		5,654	158		5,812	146	(304)	5,654
Transient	8,512		2,224	10,736		10,736			10,736	268		11,004
3rd Cl.—Single Piece	148,257		38,220	186,477	8	186,485			186,485	4,662		191,147
Bulk Regular	1,184,195		333,263	1,517,458		1,517,458			1,517,458	37,937		1,555,395
Bulk Nonprofit	446,628		118,684	565,312		565,312			565,312	14,132	(14,132)	565,312
4th Cl.—Parcels (zone rate)	241,878		136,431	378,309	520	378,829			378,829	9,471		388,300
Bound Printed Matter	28,390		14,166	42,566		42,556			42,566	1,064		43,620
Special Rate	165,389		87,740	153,129	16	253,145			253,145	6,329		259,474
Library Rate	44,531		23,676	68,207	25	68,232			68,232	1,706	(1,706)	68,712
Government Mail—USPS	61,229		14,934	76,163	(76,163)		23,389	23,389	585	(23,974)		
Other Government Mail	292,076		70,413	167,489	4,125	366,614	40,286		406,900	10,172		417,072
Free for the Blind	7,891		3,887	11,778		11,778			11,778	294		12,072

294a

APPENDIX B

DOCKET NO. R-80-1

HISTORICAL DEVELOPMENT OF COSTING PRINCIPLES

[001] The Commission has issued four recommended decisions on requests of the Postal Service for changes in postal rates. These decisions contained lengthy discussions of costing principles. The Court of Appeals for the District of Columbia Circuit has issued three opinions related to general-rate-change cases. These court opinions also contained detailed analyses of costing theories applicable to postal ratemaking. Much of the testimony in this proceeding has been directed to explaining how a party's rate proposals result from a correct application of the costing principles laid down in these prior cases. In this Appendix we will review our first three opinions and the first two decisions of the court of appeals. Our most recent opinion (R77-1) and the court of appeals' most recent decision *(NAGCP III)* are discussed in the body of the Opinion. The conclusions we have drawn from our review of earlier cases are also stated in the body of the Opinion.

I. Commission Opinion R71-1

[002] In its Opinion and Recommended Decision in Docket No. R71-1, the Commission examined arguments of the parties in favor of three different approaches to cost attribution. The Postal Service had presented costs that it denominated short-run incremental. Other parties, while not presenting data, had urged the Commission to adopt long-run costs as the proper measure of attributable costs. The OOC had proposed the use of fully distributed costs and introduced Cost Ascertainment System reports for 1969 and 1970, but he did not project them to the test year.

A. Short-Run Incremental Costs

[003] The Commission described the Postal Service's R71-1 theory of cost attribution as "founded upon the principle that a cost should be classified as 'attributable' if it varies in direct

proportion to mail volume on a year-to-year basis."[1] According to the Service, the Postal Reorganization Act required that attributable costs be measured by short-run costs. The Service cited testimony of Post Office officials at Congressional hearings on postal reorganization in support of this interpretation. The Commission found that portion of the legislative history to be ambiguous:[2]

> The hearings suggest that Congress was aware that the [Post Office] Department planned to abandon a fully allocated cost system in favor of incremental costs. But . . . that does not establish any Congressional preference for either short-run or long-run costs.

The Commission held "that the statute—far from requiring any particular method—actually envisions consideration of all appropriate costing approaches."[3]

[004] Although the Commission rejected the notion that a short-run costing approach was required by the Postal Reorganization Act, it also stated,[4]

> If attributable costs are to be separated, it is *necessary* to isolate the relationship between mail volume and costs for each individual class.

The isolation of volume-variable costs was seen as a necessary step in the development of attributable costs. The Commission also found the Service's costing presentation *sufficient* for use in setting rates in the first postal rate case.[5]

---

[1] PRC Op. R71-1 at 48.

[2] *Id.* at 44 n.1.

[3] *Id.* at 46.

[4] *Id.* at 47 (emphasis added).

[5] Later, in Docket No. R74-1, the Commission would find that the isolation of volume-variable costs was necessary *and* sufficient for the development of attributable costs. That is, a cost would be considered attributable if and only if it was demonstrably variable

[005] The Commission saw two overriding virtues in the Postal Service's short-run variable cost presentation. First, it was directly responsive to severe criticism that had recently been directed at the old Cost Ascertainment System (CAS). The Service's presentation was specifically intended to provide the economically meaningful cost information allegedly lacking in the CAS reports. Second, the Commission expected radical changes in the mail classification system that defined the various services offered by the Postal Service: "in view of the possibility of significant reclassification of mail categories, there may be unpredictable shifts in the pattern of demand for postal services."[6]

1. Economically Meaningful Cost Information

[006] Prior to postal reorganization, the President's Commission on Postal Organization (Kappel Commission) had issued a report severely critical of the use of the CAS in setting rates. The R71-1 opinion notes that "[i]n the Kappel Commission's view, the postal system lacked objective economic rate standards."[7] According to the Kappel Commission,[8]

---

with volume. Ultimately, the court of appeals would reject the notion that strict volume variability (at least in the short run) could be used as the sole criterion for attribution. This point is elaborated *infra* in the discussion of R74-1 and *NAGCP I*.

[6] PRC Op. R71-1 at 54-55 (footnote omitted).

[7] PRC Op. R71-1 at 50 (citation omitted).

[8] President's Commission on Postal Organization, *Towards Postal Excellence* 131 (1968) [hereinafter cited as Kappel Report].

> [T]o avoid undue discrimination, every class of service should, as a minimum, pay for all of those costs which it alone causes . . . In economic terms, each class should bear, as a minimum, the long-run variable costs ascribable to it—the full added costs demonstrably related to that class.

The Kappel Report went on to describe how the use of the CAS in setting rates [9]

> blurs the critical distinction between variable and fixed costs and makes it impossible to determine whether a particular class pays its true costs. For rate-making purposes we recommend use of a functional cost accounting system. The Planning, Programming, Budgeting System (PPBS) now under development in the Post Office may be a start in the right direction. Each postal function, such as mail acceptance, processing and delivery must be analyzed to determine the variability of its costs over the long run. The five-year planning horizon used in PPBS appears long enough for purposes of rate-making.
>
> Once the variable costs of each function are determined, they should be assigned to the classes of mail in proportion to the responsibility of each for such costs.

The R71-1 opinion points out that the Post Office Department anticipated the above criticisms and began development of "a more meaningful cost analysis system." [10] Development of this system proceeded through hearings and debate on postal reorganization. It was recognized by both Congress and the Post Office Department that a rate case would commence almost as soon as the Postal Rate Commission was created. [11] The Commission recognized that the Postal Service's cost presentation "represented[ed] a stage in an evolutionary process which [was] still continuing" [12] but concluded that "even the

---

[9] Kappel Report 133.

[10] PRC Op. R71-1 at 50.

[11] *Id.* at 52.

[12] *Id.*

economic witnesses critical of the system concluded that the Service's costing approach provides meaningful results." [13]

2. Significant Mail Reclassification

[007] When the Commission's opinion in R71-1 was issued, the Postal Service was about to file a statutorily mandated classification case. The Service had indicated that it would request "far-reaching changes in the present classification schedule." [14] These changes were expected to cause unpredictable shifts in the volume of demand for postal services. In these circumstances, the Commission found a costing approach that dealt solely with short-run volume changes to be reasonable.

[008] As events transpired, the Service requested only six minor changes in mail classification. [15] And the postal services described in the mail classification schedule recommended by the Commission after six years of litigation were basically the same as those originally requested by the Postal Service. This justification for using short-run costing thus proved to be ill founded.

---

[13] *Id.* at 55-56.

The chief examiner in his initial decision stated, "The new system is an advance over Postal Service's old Cost Ascertainment System in two respects: A random sample system for costing various processes was introduced to replace the former reporting system, which was not accurate; and the concept of causality in costing attributable costs was introduced to replace the allocation system formerly used. These are improvements, but the hearing indicates that further development is called for in the conception and application of the attributable cost element." I.D. R71-1 at 28-29.

[14] PRC Op. R71-1 at 55.

[15] PRC P. MC76-5 (Scope and Extent Phase) Nov. 29, 1978, at 4.

B. Long-Run Costs

[009] The Commission devoted only a page and a half to discussion of long-run costs in its R71-1 opinion. Apparently only one witness presented numerical data on long-run costs, and these data related only to the overall level of long-run costs. There was no breakdown of long-run costs by cost segment or class of mail. [16] The Commission noted that it would have been infeasible to halt the hearings in order to await a long-run cost study. The Commission also questioned the conclusion of the hearing examiner that long-run costs were the appropriate measure of attributable costs for future cases. [17]

[010] The examiner's recommendation for a long-run approach to attributable costs received sympathetic attention from the court of appeals. [18] Eventually, the court of appeals would overturn the Commission's R74-1 recommended decision (which adhered to short-run costing for that case while recommending long-run costing for future cases) [19] for failure to give close enough consideration to costing presentations similar to those espoused by the examiner in R71-1. [20] Because of the importance his views later acquired, it is appropriate to review the examiner's recommendations on long-run costing here.

[011] According to the examiner, the purpose of creating a category of attributable costs is, [21]

---

[16] *See* I.D. R71-1 at 25: "There is no reliable evidence in the record about the size of long-run costs or their distribution among the classes of mail."

[17] PRC Op. R71-1 at 56-57.

[18] *See* Association of Am. Publishers v. Governors, 485 F.2d 768, 779 (D.C. Cir. 1973).

[19] PRC Op. R74-1 at 123-27.

[20] *See* NAGCP I, 569 F.2d 570, 592 (D.C. Cir. 1976).

[21] I.D. R71-1 at 26-27.

> in the main, to assign common costs to classes of mail on the basis of cost causality. . . . If a cost segment varies with the volume of mail over the long run, it is reasonable to conclude that the costs are incurred as a consequence of this volume and should be attributed to the classes of mail processed by this segment.

In the examiner's view, the Postal Service, by adopting a short-run measure of attributable costs, was ignoring readily foreseeable long-run consequences of providing mail services. As a result, he found, [22]

> 1. The [Postal Service's] costs for classes of mail do not reflect the full cost burden they impose on the system.
>
> 2. By not taking present account of predictable long-run cost variability, the method is increasing future cost and rate instability.
>
> 3. By restricting the category of attributable costs, the method enlarges the amount of institutional costs which are distributed to the classes of mail on the basis of Postal Service's judgmental evaluation of pricing factors instead of a cost basis.

With these problems in mind, the examiner turned to an analysis of section 3622(b)(3) of title 39. [23]

---

[22] I.D. R71-1 at 29.

[23] At that time—before the 1976 amendment—section 3622(b) read as follows:

> Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

[012] The examiner reached two conclusions concerning the relationship between section 3622(b)(3) and long-run costs. (1) Attributable costs are not restricted to short-run costs, a point on which the examiner and Commission agreed. (2) Reasonable assignment of costs *could* include allocations of costs on bases other than the market factors listed in the remainder of section 3622(b), a point on which the Commission was silent.

1. Attributable Costs

[013] The examiner stressed three points of legislative history in concluding that attributable costs were not short-run costs. In support of its position, the Postal Service had cited testimony of an Assistant Postmaster General at House hearings that occurred just prior to consideration of postal reorganization. In describing the new cost accounting system the Service had developed, the witness had stated, " 'We have settled on a shorter term approach. . . .' "[24] The inference the

---

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services; and

(8) such other factors as the Commission deems appropriate.

[24] I.D. R71-1 at 32.

Service apparently wanted to draw here was that Congress was aware, when it passed the Postal Reorganization Act, of the Service's new short-run cost system and, if it had wanted a long-run system used for settling rates, would explicitly have required it.

[014] Against this testimony, the examiner balanced testimony of Postmaster General Blount. When testifying on some of the first reorganization bills, the Postmaster General "emphasized the importance of flexibility in standards for ratemaking."[25] In discussing the meaning of the term "demonstrably related costs" (which appeared in place of attributable costs in all bills prior to the finally passed bill; which the Service stated was synonymous with attributable costs; and which was criticized as being insufficiently defined), the Postmaster General said, " '[W]e believe that the legislative history has made amply clear what the term means, without shackling future generations to any particular economic theory.' " The examiner cited several other similar statements in legislative history and concluded, "These statements are in consonance with court decisions that have regularly construed ratemaking provisions of other regulatory acts to permit the Agency to exercise discretion in adopting the costing methods it considers appropriate."[27]

[015] Finally, the examiner considered the most specific piece of legislative history. In a statement attached to the conference report on H.R. 17070, the bill that became the Postal Reorganization Act, the Managers on the part of the House said,[28]

---

[25] I.D. R71-1 at 32.

[26] *Id.* at 33.

[27] *Id.* at 35.

[28] I.D. R71-1 at 36.

> "The provision in the conference substitute with respect to costs attributable to a class of mail or type of service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that *vary over the short term* in response to changes in volume of a particular class. . . ."

The examiner showed that this statement was not part of the conference report on which the Senate voted and that the Senate was unaware of its existence. The examiner also noted that the substitution of "attributable" for "demonstrably related" was worked out in a conference between certain post office officials and the Chief Counsel of the Senate Post Office and Civil Service Committee. They "did not like the phrase 'demonstrably related costs' . . . and it was changed to 'attributable costs,' which was intended to have the same meaning."[29] The examiner concluded that the House was persuaded at the last minute to adopt the Post Office Department's views on short-run costing, but that the Senate was not. Thus, the Act could not be construed as requiring short-run costing.

[016] In addition to legislative history, the statute itself contained a further reference to attributable costs. Section 3626 requires rates for certain preferred subclasses to be set no higher than their attributable costs. The Postal Service argued that "attributable costs must be short-term costs because preferential rate classes are to be favored and they wouldn't be favored if their rates were based on long-term costs."[30] The

---

[29] *Id.* at 40.

The examiner cited to the hearing transcript where counsel for the Postal Service explained that the "demonstrably related" language was "difficult to pronounce, among other defects . . . ." R71-1 Tr. 33/5043.

[30] I.D. R71-1 at 42.

examiner noted that preferential mail classes were favored in two ways under the Act. They were to pay only their attributable costs, and any rate increases were to be phased in over 10 years (later changed to 16 years). The examiner concluded that [31]

> the long-run cost of a class is the real minimum cost of providing the service. It would not be unreasonable to decide that the rates for the preferential rate classes should be based on their long-run costs, limiting the burdens they impose on the taxpayers or other classes of mail.

[017] The examiner concluded that attributable costs need not be measured by short-run variable costs. "The Act confers on the Commission discretion to construe attributable costs on the basis of its view of what sound economic and accounting policies require in the light of the circumstances of these proceedings." [32]

2. Reasonably Assignable Costs

[018] In his discussion of long-run costing, the examiner set out two possible constructions of section 3622(b)(3). One construction would involve distinguishing two groups of costs, the other, three. Under the two-tier construction one would attribute costs pursuant to section 3622(b)(3) and reasonably assign the remaining costs pursuant to the other (mainly pricing) factors listed in section 3622(b). Under the three-tier construction, one would first attribute costs and then reasonably assign costs (presumably on a "cost-of-service" basis), both pursuant to section 3622(b)(3); and finally one would recover any remaining costs through application of the other factors in section 3622(b). As the examiner saw it either construction would permit the adoption of long-run costs as the statutorily required minimum level for rates. However, he

---

[31] *Id.*

[32] I.D. R71-1 at 43.

appeared to view the two-tier construction as anomalous, because "it requires the interpretation that '*costs* . . . reasonably assignable' be the basis for assignment on a *pricing* basis."[33]

C. Fully Distributed Costs

[019] The Commission did not devote much discussion to fully distributed costs. Only the OOC advocated fully distributed costs in principle. And as noted above, he only had available CAS reports for 1969 and 1970. The Commission reserved any decision on the appropriateness of using fully distributed costs for postal ratemaking. But it noted that in light of the criticism that fully distributed costs in general, and the CAS in particular, had received prior to and during debate on postal reorganization, "Commission adoption in this first proceeding of a methodology wholly dependent upon [the CAS] would be anomalous."[34]

[020] The Commission also expressed dissatisfaction with the examiner's suggestion that "a fully distributed costing system may be essential to proper postal ratemaking."[35] The Commission viewed the examiner's preference for something like fully distributed costs as motivated by a desire to reduce the scope of judgment in the assignment of fixed costs. But as the Commission saw it, the very function of the Commission was to "decide . . . whether the judgmental distribution made by the Service [was] reasonable in light of all" the factors listed in section 3622(b).[36] The Commission concluded that "the allocation of costs is never wholly objective. No particular method has any special claim to precise objectivity."[37]

---

[33] *Id.* at 44 (emphasis added).

[34] PRC Op. R71-1 at 59.

[35] *Id.*

[36] *Id.* at 60.

[37] PRC Op. R71-1 at 61 (footnote omitted).

[021] The examiner devoted a great deal more space to a discussion of cost-of-service allocation of the Postal Service's fixed costs than did the Commission. In light of the attention later given to the examiner's views by the court of appeals, it is again appropriate to review his findings and recommendations on fixed-cost assignments.

[022] The examiner defined fully distributed costs as an allocation of[38]

> all the institutional costs to the various classes in some fair or reasonable manner, viz. proportionate to the attributable costs, according to the number of pieces, cubic volume, etc.

The examiner saw several desirable features of fully distributed costs (FDC).[39]

> FDC . . . tends to prevent the firm from setting rates at a proportionately higher level for services on which it has a legal or economic monopoly than for services on which it faces competition or *wishes to favor*. It provides a standard to judge whether Postal Service is using profits from one service to subsidize another. Thus FDC tends to promote a nondiscriminatory rate system, defining this as one in which fixed costs are distributed relatively equally among all classes and the rates for each class are based on its FDC.

The examiner also saw three disadvantages to using fully distributed costs to set rates. First, a fully distributed cost system usually does not distinguish between fixed and variable costs. "As so used, it tends not to provide information to management about the production costs of a class or about the cost element in the rate for the class." Second,

> [t]here is a tendency to regard the FDC of each class as its correct or "just" rate. If a rate is set below this level, it

---

[38] I.D. R71-1 at 51.

[39] *Id.* at 52 (emphasis added).

> tends to be regarded as below "cost," even though it is above the long-run cost for the class and contributes to fixed costs.

Third, there are situations where deviations from rates set at fully distributed costs can produce benefits (*i.e.*, lower rates) for all classes. A strict adherence to rates based on fully distributed costs sacrifices those benefits. [40]

[023] The examiner considered only the last objection to be a serious obstacle to the use of fully distributed costs in postal ratemaking. The first objection he dismissed by noting that if one labeled costs assigned on a causal basis differently from those assigned on a fully distributed basis, management would have all the information it needed about the production costs of various products. [41] The second objection he did not mention again. But the third was the basis for an extensive critique of the Postal Service's use of elasticity of demand as the primary factor in allocating institutional costs.

[024] As the examiner saw it, a rate schedule based on fully distributed costs was the appropriate place to begin an analysis of whether deviations from such a schedule would be beneficial. In the examiner's words, [42]

> Rates involving discrimination are *prima facie* unfair and inequitable and constitute undue discrimination unless they result in substantial countervailing benefits.

The key words here are "discrimination" and "benefits." As noted above, the examiner defined a nondiscriminatory rate schedule "as one in which fixed costs are distributed relatively equally among all classes. . . ." [43] Implicit in this definition is the notion that a relatively equal distribution of fixed costs is *a*

---

[40] I.D. R71-1 at 53.

[41] *Id.*

[42] I.D. R71-1 at 69.

[43] *Id.* at 52.

priori preferable to any other distribution. The examiner was aware that the only basis for such a preference is "a sense of superficial equity among rates," [44] but this was apparently sufficient for him. The examiner defined benefits as lower rates. [45] Implicitly excluded from the examiner's definition of benefit was the concept of economic efficiency or Pareto optimality—that is, obtaining the maximum value from a given collection of scarce resources. [46]

[025] The examiner carefully analyzed the conditions under which a policy of deviating from fully distributed costs could benefit all classes of mail. He isolated two conditions that

---

[44] *Id.*

[45] *See, e.g., id.* at 58, 75.

[46] The examiner was aware that using elasticity of demand as a basis for allocating institutional costs maximizes the difference between what consumers are willing to pay for a product and what they actually pay for it. This difference is known as consumers' surplus. I.D. R71-1 at 70 n.1. The examiner was either unaware of or attached no value to the fact that a rate schedule is economically efficient if and only if it maximizes consumers' surplus (subject to relevant constraints such as breaking even or charging a single price for each product). A rate schedule that is not economically efficient (or, equivalently, not Pareto optimal) *always* contains the *potential* for an adjustment that leaves *all* classes of consumers better off. *See, e.g.*, P. Samuelson, Economics 462 n.12, 504 n.2, 634 n.3 (10th ed. 1976); R. Sherman, Economics of Industry 18, 407-08 (1974). The examiner was unwilling to accept adjustments from fully distributed costs unless the *potential* benefits for all classes could *actually* be realized. In adopting this approach, the examiner was implicitly following a policy described by Alfred Kahn: "some commentators, aware of the possible benefits of price discrimination to all parties but unwilling to sanction transfers of benefit from one group of customers to another, have proposed that discriminatory reductions be permitted *only* to the point of maximizing the benefit to customers discriminated *against*." A. Kahn, Economics of Regulation 145 (1970).

he believed were necessary for a policy of discrimination to be beneficial to all classes: economies of scale and at least one class of mail with elastic demand.

1. Elasticity of Demand

[026] The examiner pointed out that changing the price of a product does not always have the same effect on the total revenues of an enterprise. A price increase may cause revenues to rise, fall, or remain unchanged. When a price increase (decrease) causes revenues to rise (fall), demand is said to be inelastic. When a price increase (decrease) causes revenues to fall (rise), demand is said to be elastic. When a change in price causes no change in revenues, the elasticity of demand is said to be unitary. [47]

[027] The examiner next explained [48] that when an enterprise markets several services and

> where all services have inelastic demands, lowering the price of any of them will require that one or more of the prices of the rest of the services be raised in order for the firm to continue to meet its overall revenue requirements.

On the other hand, if one of the services has an elastic demand and its price is reduced, total revenues from that service will increase. If the increase in total cost (caused by the increased volume sold at the lower price) is less than the increase in total revenue, [49]

> then the contribution required from the other services to the overall revenue requirement will be reduced, and consequently the rates on those other services may also be reduced.

---

[47] I.D. R71-1 at 56.

[48] *Id.* at 57.

[49] *Id.* at 58.

2. Economies of Scale

[028] As the examiner saw it, the only situation in which an increase in the volume of a particular product could result in a greater increase in total revenue than in total cost was if the enterprise exhibited economies of scale. [50] "Stated technically, economies of scale occur when long-run incremental costs are lower than average costs." [51] The examiner presented a numerical example in which he attempted to show that economies of scale are *necessary* before one can obtain a surplus of revenue over cost as the result of a price reduction. He believed that "as a practical matter" one could not obtain sufficient excess revenue from a price reduction to benefit other classes unless demand for the product whose price was reduced below fully distributed cost was elastic *and* there were economies of scale. [52] However, he concluded by noting, [53]

> It is theoretically possible for a decrease in the price of an elastic product to yield an increase in net revenue without economies of scale, if the elasticity is great and if the reduced price remains above the incremental cost.

---

[50] I.D. R71-1 at 62.

[51] *Id.* at 59. This statement is correct for a single-product enterprise or a multiproduct enterprise with no joint or common costs. This is easily seen from the definition of average cost, which is total cost divided by total output. In a multiproduct enterprise total output consists of several different products, which, like apples and oranges, cannot be added together. Thus, the denominator of average cost is usually undefined for the multiproduct enterprise. In the special case where each output is produced separately (*i.e.*, no joint or common costs), a total cost for each product can be determined unambiguously and a separate average cost for each product calculated. The examiner's definition was irrelevant to an enterprise like the Postal Service whose "costs in major part are common costs." Id. at 9-10.

[52] *Id.* at 62-63.

[53] *Id.* at 63 n.1.

[029] The examiner found as facts that the Postal Service did not exhibit economies of scale and that demand for all classes of mail was inelastic. [54] He thus concluded that deviations from prices set at fully distributed costs had not been justified by the Service. However, he did not recommend that rates be set on the basis of fully distributed costs. He recommended that [55]

> [o]nly the minimum necessary changes . . . be adopted in the specific rates proposed by Postal Service because the record in this case does not permit the determination of rates on what should be the proper basis.

D. Conclusion

[030] The Commission's opinion in R71-1 contains only two clear statements on costing principles. Attributable costs are not legally restricted to short-run variable costs. And fully distributed costs "can be no more than a guide to ratemaking under the Act." [56] As for long-run costing, the Commission declined to make any determination as to whether that approach should be required in future cases. [57]

II. The *AAP* Case

[031] Several parties appealed the R71-1 decision. [58] However, costing philosophy was not an issue. Nevertheless, the court of appeals, in a unanimous concurring opinion, severely criticized the Postal Service's costing presentation.

[032] The court's concern was "an unstructured and wellnigh unreviewable discretion in two [Postal Service em-

---

[54] I.D. R71-1 at 98.

[55] *Id.* at 99.

[56] PRC Op. R71-1 at 58 n.1.

[57] *Id.* at 56.

[58] Association of Am. Publishers v. Governors, 485 F.2d 768 (D.C. Cir. 1973).

ployees] to propose allocation of over half the Service's budget."[59] The "allocation" referred to was the assignment of institutional costs on the basis of relative elasticity of demand. The court saw two serious problems with the Service's treament of institutional costs. The first was the amount of money involved (over five billion dollars), and the second was the manner in which the Service assigned the costs.[60]

[033] The court began its concurring opinion by noting that one reason for postal reorganization was the desire of Congress to "remove the Post Office Department from the Political arena."[61] The court noted that one mechanism that Congress established for reducing political influence was the requirement in section 3622(b)(3) of title 39 that each class of mail bear the costs attributable and reasonably assignable to it. The court apparently viewed the use of the word "costs" to mean more than simply expenses; that is, to imply that both attributions and assignments should be performed on a cost-of-service basis.[62] The court also seemed to believe that getting the Post

---

[59] *Id.* at 778.

[60] *Id.* at 779.

[61] *Id.* at 776.

[62] Near the end of the concurring opinion, the court noted that Congress's "stated intent to purge the postal system of 'politics' provides a strong indication that the Chief Examiner was correct when he suggested that discretionary or 'reasonable' assignment of costs should apply only where Postal Service simply *could not* 'attribute' costs." In a footnote, the court quoted the examiner's initial decision for the proposition that "assignment of costs was to be carried out *as far as it reasonably could be.*" 485 F.2d at 779 & n.17. This statement clearly implies that assignments should be made on a cost-of-service basis. Under the Postal Service's theory, which the court was criticizing, assignment on the basis of elasticity of demand applied to *all* institutional costs. There was no point at which the Service would have said that assignments could no longer be reasonably carried out.

Office out of politics meant using cost-of-service principles to the maximum extent feasible. It spoke of the need to "regularize" the Postal Service's accounting procedures[63] and to "structure" the Service's process for preparing discretionary (*i.e.*, noncost-based) allocations.[64]

[034] The court was openly skeptical of the seriousness of the Postal Service's attempt to meet the requirements of section 3622(b)(3). Terming the Service's efforts "questionable at best,"[65] the court described the Service's reasonable assignments as having been derived by two employees using a formula.

> The formula, in turn, was *purportedly* composed of three factors: (1) the *hypothesized* elasticity of demand for each class of mail; (2) the "value" of each class; and (3) the competitive stance of the Postal Service in those cases in which it lacked a legal monopoly. And when application of this *vague* formula threatened to result in great changes from pre-existing rates, it was simply suspended and an alternative substituted.[66]

The court then stated that not only was this "scheme" for assigning costs defective, but it had been applied in a way that could not be replicated.[67] The court quoted the examiner's initial decision for the proposition that the service's technique for assigning institutional costs was an " 'invitation to pressures which Congress sought to avoid.' "[68] The court concluded

---

The court of appeals eventually pointed specifically to the word costs as requiring the use of cost-of-service principles for making reasonable assignments. NAGCP III, 607 F.2d 392, 400 (D.C. Cir. 1979).

[63] 485 F.2d at 777.

[64] *Id.* at 779.

[65] *Id.* at 777.

[66] 485 F.2d at 777-78 (footnotes omitted, emphasis added).

[67] *Id.* at 778.

[68] *Id.* (footnote omitted).

its description of the Service's assignment technique by characterizing it as a "loose approach to development of rate proposals."[69]

[035] Although the court had much to say about the defects in the Postal Service's cost assignments, it had little to say in the way of recommending specific improvements. The Service and the Commission were advised[70]

> to take a hard look at both the manner in which Postal Service assigns unattributable costs and the amount of costs that it designates "unattributable."

And in a concluding footnote, the court said[71]

> The Commission would be well advised in this undertaking to begin with the excellent opinion of Chief Examiner Seymour Wenner.

III. Commission Opinion R74-1

[036] In its opinion in the second postal rate case, Docket No. R74-1, the Commission took one step that can be interpreted as explicit compliance with the dictum of the court's concurring opinion in the *AAP* case. The Commission adopted the long-run variable cost approach to attributions that the examiner had recommended in his initial decision in R71-1. However, the Commission did not substantially reduce the percentage of institutional costs nor change the manner in which these costs were assigned to classes of mail. Indeed, the absolute dollar amount of institutional costs rose in R74-1 over R71-1, due to the increase in the total revenue requirement.

[037] The Commission undertook to accomplish two distinct tasks with respect to costing in R74-1. One task was to prescribe an approach for distinguishing attributable costs

---

[69] *Id.*

[70] *Id.* at 779.

[71] 485 F.2d at 779 n.18.

from other costs of the Service. The other task was to distribute attributable costs to classes of mail based on the record in R74-1. In many cases, the Commission found that it could not attribute costs in accordance with the method it had prescribed. In these cases it chose not to attribute the costs involved, but to await development of data that would permit attribution in future cases in accordance with its prescribed method.

A. Costing Theory

[038] The Commission recommended that attributable costs be measured in terms of long-run variable costs. The Commission believed that long-run variability provided the best basis for an objective determination of cost causation. The Commission drew on two primary sources in adopting a long-run variable costing theory: economic theory and legislative history.

1. Economic Theory

[039] The Commission made the distinction between fixed and variable costs the cornerstone of its economic theory of costing. A cost would be considered attributable if and only if it was variable with volume. That is, variability with volume was a necessary and sufficient condition for attribution of a cost component.

[040] That variability with volume should be sufficient to establish causality is not difficult to understand. It is almost tautological. A variable cost is one that will change *because* of a change in the volume of a class of mail. A finding of variability is thus simultaneously a finding of causation. As the Commission said, [72]

> if a particular cost varies with a change in volume units, we infer that the cost is caused by such change and can be attributed to the class or service experiencing the change.

---

[72] PRC Op. R74-1 at 112.

> From volume variability, therefore, we can infer, and thereby establish, the causation that we seek.

[041] This conclusion is unremarkable. But the Commission went further. It also stated, [73]

> It is *essential* that [attributable] costs be related to volume variability, if we are to ascertain and causally relate costs to the mail classes and services.

Only if a cost were variable with volume would the Commission consider it attributable. The Commission offered two reasons for this approach. First, it could not find "any other reliable principle of causality on this record." [74] Second, if a cost is not variable, it is fixed; and a fixed cost bears no causal relation to classes or services.

[042] The second reason contains two separate conclusions, neither of which is self-evident. The first of these is that costs are either variable or fixed. This conclusion is accurate, provided that functional costs are broken down into fine enough detail. [75]

[043] The other conclusion, that a fixed cost bears no causal relationship to classes or services, can be understood by observing what happens to a fixed cost if volume declines. Nothing happens. A fixed cost remains unchanged by a change in volume. And a cost that remains the same after a volume decline can hardly be said to be caused by the class of mail whose volume declined. In the extreme, one can ask what would happen if an entire subclass were eliminated. If a cost

---

[73] PRC Op. R74-1 at 111 (emphasis added).

[74] *Id.* at 94.

[75] *See id.* at 114-15. One of the Commission's problems in attempting to implement its variable cost theory was that the Service's costs were not broken down into sufficient functional detail to permit an accurate separation of fixed and variable costs. *Id.* at 130.

remains unchanged in this extreme circumstance, it clearly bears no causal relationship to the subclass eliminated. [76]

[044] The above discussion refers constantly to volume and cost. A clear understanding of the Commission's theory requires a clear understanding of the meaning of these words.

[045] An issue that did not receive explicit consideration by the Commission in its costing discussion in R74-1 is whether volume is the only characteristic of a class that is relevant to an analysis of cost causation. This issue is particularly troublesome when one remembers that the Commission succeeded in attributing only 52.5 percent of the Postal Service's costs using volume variability as its criterion for attribution. Are there really no other possible causal relationships between costs and classes of mail?

[046] The Commission thought so. In order to understand the Commission's view, it is necessary to distinguish between two possible meanings of the word "volume." It will be recalled that the Commission faced two tasks in attributing costs. One task was to determine what portion of the Service's overall revenue requirement was attributable. The other task was to allocate the costs deemed attributable to the classes and services.

[047] The concept of volume variability is related to the issue of attribution level—how much of the Service's revenue requirement should be attributed. Here, the word volume should be synonymous with output or product, *e.g.*, letters, magazines, circulars, or parcels. Used in this way, the word volume can include all the cost-causing characteristics of the various products of the Postal Service. Letters, etc., cause

---

[76] UPS proposed that this "avoidable" cost approach be used in R74-1. However, having proposed this approach, it then presented cursory conclusions regarding variability, without engaging in analysis of cost behavior. PRC Op. R74-1 at 124.

costs. And the extent to which they cause costs can be measured and verified by observing whether and by how much costs change when volume changes.

[048] The Commission also used the word volume in connection with the task of distributing attributable costs to classes and services. Here, the word is synonymous with distribution keys or work units, *e.g.*, pieces, pounds, cubic feet. [77] Used thus, the word volume has a narrower meaning than when used to mean letters, magazines, etc. When the word volume carries this narrower meaning, it does not include all cost-causing characteristics of a class of mail (the most obvious missing characteristics being speed and reliability of delivery). Ideally, volume variability should refer to volume in the broad sense, and thus can include the cost consequences of differences in speed or reliability of delivery. The Commission, however, based its attributable costs on the narrow definition of volume. As a result, the court of appeals, in *NAGCP I*, rejected volume variability as the sole criterion for identifying attributable costs.

[049] The word cost, when used in the context of variability, refers to a functional cost component. [78] The Postal Service divided its cost among 87 such components. [79] Some examples

---

[77] PRC Op. R74-1 at 103 n.3.

[78] PRC Op. R74-1 at 114 n.2, 131.

[79] The initial decision succinctly described the Postal Service's cost segments as follows:

> The Postal Service accounting system is based on classification into crafts and operations, such as clerks and mailhandlers, vehicles, vehicle drivers, mail carriers, building occupancy costs, maintenance service, transportation, etc. Costs for these groups of crafts and operations are called cost segments and the segments are accumulated as totals for the system; in general, they are not collected on the basis of the work performed for each class of mail. It is necessary, therefore, to break these costs out from the accounting segments in order to attribute them to the

of these functional cost components are clerks and mailhandlers—mail processing costs; city delivery carriers—costs of stopping for individual deliveries; rural carriers—equipment maintenance allowances. The Commission also created some new components, *e.g.*, regular rural carriers—in-office costs. The purpose of dividing costs among functional components is to aid in analysis of cost causality. Without such a division, determination of causal relationships would be impossible.

[050] The need for functionalized cost data is fairly obvious. If one does not know how the Postal Service's budget is spent, one cannot reach any conclusions about cost causality. In order to now whether a class of mail is responsible for certain expenses, one must know what work was performed or resources consumed when the expense was incurred. It is impossible to associate dollars of expense in the abstract with classes of mail on any causal basis.

2. Legislative History

[051] The Commission's review of legislative history in R74-1 paralleled that presented in R71-1. The Commission concentrated on those aspects of legislative history dealing explicitly with cost allocation. In the Commission's view, "this background material emphasizes the importance of variable costs in postal ratemaking."[80]

[052] The Commission first directed its attention to three documents that were published before hearings on postal

---

various classes of mail. There are 20 major accounting segments with some 87 subsegments based on these various crafts, operations, and divisions, and the cost analysis will perforce have to follow these accounting segments.

I.D. R74-1 at 17.

[80] PRC Op. R74-1 at 78-79.

reorganization began. The three documents were a 1954 Senate report critical of the Cost Ascertainment System, the Kappel Commission report, and recommendations of the accounting firm of Touche, Ross, Bailey and Smart concerning a new cost accounting system for the Post Office Department.[81] The Commission concluded that these documents exhibited

> a general consensus of expert cost analysts that postal cost allocations should be performed in a manner different from the Cost Ascertainment System. Moreover, they also agreed that a better way involved the analysis of cost variability in relation to volume.

[053] The Commission next turned to an examination of testimony during Congressional hearings on postal reorganization. The Commission concentrated on statements of Postmaster General Blount. The Postmaster General seemed to divide postal costs into "demonstrably related" or "attributable" costs on one hand and "institutional" costs on the other.[82] He defined institutional costs as fixed costs, " 'not subject to change because of volume changes,' "[83] implying that attributable costs should be the volume-variable costs.

[054] The Commission looked last at Congressional statements. The Commission quoted from the reports on the House and Senate bills and the conference report on the bill that became the Postal Reorganization Act. These quotes essentially paraphrased the actual language of the bills and provided little enlightenment—even the quote equating attributable costs with costs that vary over the short run in response to volume changes. That quote appeared only in a statement of the House managers, not in the conference report that the Senate voted on.

---

[81] *Id.* at 82-83.

[82] PRC Op. R74-1 at 87.

[83] *Id.* at 86 (footnote omitted).

[055] The Commission took a narrow, legalistic, traditional approach to using legislative history to interpret the statutory term attributable cost. It looked to those portions of the legislative history dealing specifically with cost allocations. It looked for explicit definitions of the word attributable. The Commission did not seek meaning in general statements about getting the Post Office out of politics or instituting scientific ratemaking.

APPENDIX G

Schedule 1

TEST YEAR REVENUE AND COST COVERAGE BY CLASS AT COMMISSION-RECOMMENDED RATES

	Commission Attributable/ Assignable Cost (000)	Calculation of Revenue at Commission-Recommended Rates in Schedule 2 of this Appendix	Revenue at Commission-Recommended Rates (000)[1]	Volume in Pieces (000)	Cost/Pc (Cents)	Commission Rev/Pc (Cents)	Contrib. to Institutional Cost/Pc (Cents)	Cost Coverage
First Class								
Letters	9,448,762	Pg. 1	11,783,071	58,583,010	16.129	20.113	3.984	125%
Cards	249,897	Pg. 2	331,216	2,416,744	10.340	13.705	3.365	133
Priority Mail	465,774	Pg. 3	738,074	237,720	195.934	310.480	114.546	158
Express Mail	150,265	Pg. 4	335,459	26,645	563.952	1,258.994	695.042	223
Mailgrams	5,232	Pg. 4	20,547	52,684	9.931	39.000	29.070	393
Second Class								
Within County	58,634[2]	Pg. 5	58,716	1,140,156	5.143	5.150	0.007	100
Regular Rate	681,182	Pgs. 6-7	823,998	5,823,529	11.697	14.149	2.452	121
Nonprofit	194,919[2]	Pg. 8	194,751	2,289,307	8.514	8.507	(0.007)	100
Classroom	5,654[2]	Pg. 9	5,615	54,793	10.319	10.248	(0.071)	99
Transient	11,004	Pg. 10	11,008	14,662	75.051	75.078	0.027	100
Third Class								
Single Piece	191,147	Pg. 11	191,375	231,778	82.470	82.568	.098	100
Bulk Regular	1,555,395	Pg. 12	2,081,346	22,355,919	6.957	9.310	2.353	134
Bulk Nonprofit	565,312[2]	Pg. 13	564,236	8,197,187	6.896	6.883	(0.013)	100

	Commission Attributable/ Assignable Cost (000)	Calculation of Revenue at Commission-Recommended Rates in Schedule 2 of this Appendix	Revenue at Commission-Recommended Rates (000)[1]	Volume in Pieces (000)	Cost/Pc (Cents)	Commission Rev/Pc (Cents)	Contrib. to Institutional Cost/Pc (Cents)	Cost Coverage
Fourth Class								
Parcel Post	388,300	Pg. 14	411,789	171,562	226.332	240.023	13.691	106
Bound Printed Matter	43,620	Pg. 15	60,768	117,738	37.048	51.613	14.565	139
Special Rate	259,474	Pg. 16	274,507	231,382	112.141	118.638	6.497	106
Library Rate	68,232[2]	Pg. 17	67,957	61,858	110.304	109.860	(0.445)	100
Government Mail	417,072	Pgs. 18-19	967,189	3,506,463	11.894	27.583	15.689	232
Free for Blind	12,072		—	35,964	33.567	—	—	—
International Mail[3]	773,658		897,839	1,025,833	75.418	87.523	12.105	116
Total Mail	15,545,605		19,819,461	105,549,101				
Special Services	657,221	Pgs. 20-32	792,524					
Total Mail & Services	16,202,826		20,611,985					
Other Income			79,314					

APPENDIX G

Schedule 1

TEST YEAR REVENUE AND COST COVERAGE BY CLASS AT COMMISSION-RECOMMENDED RATES *Continued*

	Commission Attributable/ Assignable Cost (000)	Calculation of Revenue at Commission-Recommended Rates in Schedule 2 of this Appendix	Revenue at Commission-Recommended Rates (000)[1]	Volume in Pieces (000)	Cost/Pc (Cents)	Commission Rev/Pc (Cents)	Contrib. to Institutional Cost/Pc (Cents)	Cost Coverage
Investment Income			230,446					
Public Service			692,898					
Continuing Appropriations[4]			408,728					
Institutional	5,810,799							
TOTAL	22,013,625		22,023,371					
Surplus			9,746					

[1]Includes phasing appropriations for preferred classes.
[2]Attributable costs only.
[3]Not subject to PRC jurisdiction.
[4]*See* Appendix L, pp. 3.

APPENDIX J
CS XV
Page 225

Cost Segment XV
BUILDING OCCUPANCY

[353] Included in this cost segment are the costs of renting and leasing postal facilities; fuel and utilities for all postal facilities; communications services; and certain other building expenses. The Commission attributed, in total, 65.2 percent of the costs of Cost Segment XV in Docket No. R77-1.

Commission R77-1 Levels of Attribution and Assignment
Building Occupancy
($ millions)

	Accrued Costs	Attributable Costs	Assignable Costs	Percent Attributed/ Assigned
PRC (R77-1)				
Rents	$256.4	$243.3	$0	94.9
Fuels & Utilities	166.5	93.6	0	56.2
Other	94.2	0	0	0
	$517.1	$336.9	$0	65.2

[354] Two parties to this proceeding have filed complete proposals for this cost segment—the Postal Service and the OOC. A summary of these proposals is presented on the following page. In addition, another intervenor, March of Dimes, proposes to treat the cost of rents different from the method used in recent proceedings. We address this proposal in detail following a discussion of the Service's proposal.

Comparative Levels of Attribution and Assignment
Building Occupancy Costs
($ millions)

	Accrued Costs	Attributable Costs	Assignable Costs	Percent Attributed/ Assigned
USPS (R80-1)[1]				
Rents	$311.0	$311.0	$0	0
Fuel & Utilities	232.8	125.8	0	54.0
Other	47.7	—	0	0
Total	$591.5	$436.8	$0	73.8
OOC (R80-1)[2]				
Rents	$311.0	$0	$205.4	66.0
Fuel & Utilities	232.8	0	155.8	66.9
Other	47.7	0	0	0
Total	$591.5	$0	$361.2	61.1

[1] Postal Service figures from Dalton workpaper 4, at 518 and 528 and USPS-8F.

[2] Officer of the Commission Compliance with Presiding Officer's Suggestion, October 21, 1980 at 3.

A. The Service's Costing Method

1. Rents

[355] In keeping with the methodoiogy established in R76-1 and refined in R77-1, the Postal Service, based on a survey of space utilization, prepares a functional distribution of the total square footage of space reported in the current inventory of facilities. Next, average economic (current) rental values per square foot of space are applied to the proportion of total

square footage occupied by each of the various operational functions. Then attributable percentage estimates associated with each operational function are applied to the functional rental costs to yield the respective attributable cost estimates.

[356] Notably, in the procedure described above, economic (current) rental values are substituted for the actual rental costs incurred and the building/leasehold depreciation expense accrued by the Service. As the Postal Service explains: [1]

> This shadow cost substitution is provided for rents and facility depreciation in order to avoid possible biases associated with chance differences in age, location, condition, and/or acquisition terms for facilities housing the respective functional activities and their associated classes of mail.

[357] Moreover, since the variable portion of the total current rental value exceeds the total accrued cost of rents, building depreciation and amortization of leasehold improvements, [2] the Postal Service applies the method adopted by the Commission in its R76-1 Opinion. This method limits the attribution of rental values to an amount not to exceed the accrued costs of the relevant components—rents, depreciation of buildings and amortization of leasehold improvements. Therefore, because the attributable portion of the estimated economic rental values exceeds the sum of the accrued rental and depreciation expenses, these two costs are treated as fully attributable.

[358] Thus, the functionalized space, priced at current rental values, produces the following attributable costs by function for the test year at the Service's proposed rates. [3]

---

[1] Lib. Ref. C-3 at 118.

[2] Building depreciation and leasehold improvements are included in Cost Segment XX.

[3] USPS-87 at 46. Attributable portions are either based on the percentage attributable factor for the labor involved (*e.g.*, window service, administrative or independently determined (*e.g.*, mail processing, parcels, platform); Lib. Ref. C-3 at 119-21.

	Attributable Costs
Window Service & Lockboxes	$ 55,429
City Carriers	32,757
Special Delivery; Registry; Express Mail	7,260
Mail Processing; Parcels; Platforms	184,692
Rural Carriers	3,891
Administrative	27,002
Total	$311,031

[359] The Service then distributes the foregoing attributable costs to rate categories in the following manner:[4]

a. Window Service and Lockboxes: The portion applicable to lockboxes is distributed directly to the lock and call box services; the window service portion is distributed to rate categories on the basis of attributed window-service clerk cost.

b. City carriers and rural carriers: The costs of each are distributed separately on the basis of their respective attributable labor costs.

c. Special delivery; registry; express mail: The costs of each are allocated directly to their respective rate or service categories.

d. Mail processing; parcels; platforms: Costs of processing space are distributed on the basis of clerk and mailhandler direct labor in first- and second-class offices. Parcel processing space is distributed to fourth-class mail (by subclass) only, and other processing space is distributed to all other categories

[4] Lib. Ref. C-3 at 119-21, and Docket No. R77-1, USPS-15 at 160-61.

except fourth class. Platform space is distributed on the basis of labor performed for platform operations.

e. Administrative: Costs of administrative space are apportioned according to the distribution of variable labor costs for all administrative clerks, postmasters, bulk mail facility managers and higher level supervisors.

2. Fuel and Utilities

[360] The space survey discussed under Rents (above) provides the total square footage of space, by work function. Total accrued costs of fuel and utilities are then distributed to work functions in proportion to the space occupied by those functions. Attributable cost percentages for the various work functions are then applied to their respective fuel and utilities costs to derive the attributable portion of each. The attributable costs thus developed by work functions are then distributed among rate categories on the same basis as rental costs.

B. Positions of the Parties

[361] March of Dimes witness Haldi and Officer of the Commission witness Robertson took exception to the Postal Service's treatment of this cost segment. Witness Haldi contends that the use of "shadow prices" (current rental values) gives rise to several anomalies, specifically:[5]

(1) That total attribution of rents is "capped" by actual accrued costs;

(2) That fuel and utility payments which are an implied part of the actual rental payments are fully attributed, while fuel and utility payments paid directly by the Postal Service are only 54 percent attributed;

(3) That the costing of the square footage of attributable and nonattributable pace is nonsymmetric; and

(4) That the usages of capital goods, i.e., building rents and depreciation as compared with vehicle depreciation, are valued entirely differently.

---

[5] Direct Testimony of John Haldi at 39-43.

Accordingly, Haldi concludes that:[6]

> Until the Commission adopts replacement valuation uniformly for all cost segments, March of Dimes, *et al.* recommends that (1) the attribution of rent and building depreciation be based on actual accrued cost, and (2) attribution of rent and building depreciation be limited to that which will vary within 3 years from the end of the test year, or, alternatively, attribution be treated as a specific fixed cost rather than a variable cost. If shadow price valuations are to be used, rent and building depreciation should be treated as a reasonably assignable cost rather than as an attributable cost.

[362] Taken at face value, witness Haldi's criticism and recommendations appear to have merit. However, as we noted previously, the Postal Service substitutes shadow costs (current rental values) for actual costs of rents and depreciation in order to avoid biases associated with differences in age, condition, location and/or acquisition terms for facilities housing the respective functional activities and their associated classes of mail. Notably, for example, many of the Service's facilities are aged and fully depreciated; thus, even though these facilities continue in use and benefit the various classes of mail, no current cost (depreciation) is incurred. In contrast, the cost of rent or depreciation associated with newly constructed or leased facilities could, in today's economy, be characterized as inordinately high. The Postal Service's substitution of current rental values for actual costs mitigates the cost disparities and equalizes the cost of space per square foot among the various functional activities and their associated classes of mail. We find that this methodology is fair, equitable and appropriate.

[363] Because total current rental values are significantly greater than total actual costs, the attributable portion of the current rental value is also greater than the total actual costs. Hence, the Postal Service limits the attribution so as not to exceed the total actual costs. We find this to be appropriate for

---

[6] *Id.* at 43.

two reasons: first, because the Postal Reorganization Act requires that postal rates be set so as to cover actual costs as nearly as practicable; and second, because of the "extended attributions" required by the court of appeals in *NAGCP I*.

[364] Finally, witness Haldi is critical of the Postal Service's "differential treatment" accorded to facility rent and depreciation as compared with vehicle depreciation. He contends:[7]

> When a vehicle is ready to be retired from service its residual value is close to zero. By the same token, when the lease on a rental facility expires, the residual value of that lease and that space to the Postal Sevice is essentially zero. To the extent that the Postal Service must acquire a new vehicle to replace one that has been retired, it must pay the current market price for a new truck. Similarly, to the extent that the Postal Service must enter into a new lease to replace a previously rented facility, it must pay the current market price for space. The length of economic life is not a pertinent economic consideration as to whether replacement cost valuation is appropriate.

[365] We disagree. First, it is to be noted that witness Haldi is comparing leased facilities with purchased vehicles—he overlooks the impact of facilities owned by the Postal Service. Owned facilities, especially those constructed and paid for by the Service, have an expected life of up to forty years. In contrast, purchased vehicles have an expected life of three to five years and, in general, last no longer than that because of wear and tear. Clearly, the annual depreciation of a vehicle purchased three to five years ago is more in tune with today's economy than is the annual depreciation of a building purchased forty years ago. This relationship is, in our view, a fundamental reason why the use of current rental values is appropriate for the purpose of attributing costs of facility rents and depreciation.

---

[7] Direct Testimony of John Haldi at 42-43.

[366] The OOC proposes to assign 61.1 percent and attribute none of the costs included in Cost Segment XV. This proposal follows from his operational/administrative functional distinction, the underlying basis for his R80-1 costing proposal. The costs of this segment are, for the most part, considered floor-space related. The OCC classifies these space-related costs as assignable since, he considers these costs related to operational functions:[8]

> floor space appears to be less causally-related to the physical mailhandling activity than are labor and equipment costs.

[367] The OOC proposal is not based on analysis of the costs included in this cost segment. Instead, he relies on a broad functional classification of costs (supplied by the Service) and arbitrary designations (e.g., that costs he classifies as operational are attributable/assignable and costs he classifies as administrative are residual; and that floor space costs are assignable and other operational costs are attributable) to determine costs allocable on (his) cost-of-service basis. This approach does not conform to governing court decisions. It is unacceptable.

[368] In this Opinion we maintain the R77-1 methodology for determining attributable costs. We have examined the fixed costs of this cost segment in an attempt to causally relate fixed costs and classes and services, but on this record we can

[8] OOC-T-100 at 36.

find no other causal connection. We are attributing more costs than the Service because of our increased attributions of certain direct labor costs (*e.g.* city carriers, rural carriers). Our levels of attribution are shown in the following table.

Commission Level of Attribution and Assignment
Building Occupancy
($ millions)

	Accrued Costs	Attributable Costs	Assignable Costs	Percent Attributed/ Assigned
PRC (R80-1)				
Rents	$311.0	$311.0	$0	100.0
Fuel & Utilities	232.8	128.0	0	55.0
Other	47.7	0	0	0
Total	$591.5	$439.0	$0	74.2

COST SEGMENT XV (BUILDING OCCUPANCY)
PRC TEST YEAR AFTER RATES
(000)

	Longer Run			
	Rents	Fuel & Utilities	Other	Total
1st Class: Ltrs. & Parcels	$120,970	$ 47,957	$	$168,927
Presort Ltrs. & Parcels	18,022	8,038		26,060
Govt. Postal Cards	379	152		531
Private Post Cards	2,569	997		3,566
Presort Pvt. Post Cards	431	176		607
Priority Mail	14,807	5,936		20,743
Express Mail	1,072	416		1,488
Mailgrams	83	31		114
2nd Class: Within County	881	383		1,264
Regular Rate	10,141	4,340		14,481
Nonprofit	3,558	1,521		5,079
Classroom	61	28		89
Transient	239	107		346
3rd Class: Single Piece	22,912	10,094		33,006
Bulk Regular	4,804	2,032		6,836
Bulk Nonprofit	9,814	4,238		14,052

	Longer Run			
	Rents	Fuel & Utilities	Other	Total
4th Class: Parcel Post	12,932	5,861		18,793
Bound Printed Matter	941	372		1,313
Special Rate	10,282	4,319		14,601
Library Rate	2,153	1,007		3,160
Govt. Mail—Penalty—USPS	1,384	554		1,938
Other	7,256	2,866		10,122
Franked—Congress	258	108		366
Other	97	37		134
Free for Blind, Handicapped & Servicemen	344	145		489
International Mail:				
Surface Ltrs. & Cards	1,394	552		1,946
Other	1,817	688		2,505
2nd Class	76	37		113
Parcel Post	2,519	986		3,505
Airmail Ltrs. & Cards	2,589	988		3,577
Other	657	244		901
Parcel Post	801	330		1,131

COST SEGMENT XV (BUILDING OCCUPANCY) *Continued*
PRC TEST YEAR AFTER RATES
(000)

	Longer Run			
	Rents	Fuel & Utilities	Other	Total
Special Services:				
Registry	6,546	2,428		8,974
Certified	736	314		1,050
Insurance	289	127		416
COD	189	81		270
Special Delivery	1,487	524		2,011
Money Orders	4,251	1,756		6,007
Stamped Envelopes	302	125		427
Special Handling	26	11		37
Lock & Call Box	37,434	15,789		53,223
Other	3,528	1,340		4,868
Total Attributable	311,031	128,035	—	439,066
Institutional		104,739	47,720	152,459
Total Costs	$311,031	$232,774	$47,720	$591,525

APPENDIX J
CS XVI
Page 241

COST SEGMENT XV (SUPPLIES & SERVICES)
PRC TEST YEAR AFTER RATES
($000's)

	Short Run Variable				Longer Run Variable	
	Stamps & Dispencers	Money Orders & Postal Cards	Equipment Maintenance	Other	Custodial & Building	Total
1st Class: Ltrs. & Parcels	53290		1377		23797	78464
Presort Ltrs. & Parcels			109		3990	4099
Govt. Postal Cards			1		75	76
Private Post Cards	534		16		495	1046
Presort Pvt. Post Cards					88	88
Priority Mail	67		19		2945	3031
Express Mail			6		206	212
Mailgrams					15	15
2nd Class: Within County			9		189	198
Regular Rate			85		2153	2238
Nonprofit			12		756	768
Classroom			1		14	15
Transient	23				52	75

APPENDIX J—*Continued*
CS XVI
Page 241

COST SEGMENT XV (SUPPLIES & SERVICES)
PRC TEST YEAR AFTER RATES
($000's)

	Short Run Variable				Longer Run Variable	
	Stamps & Dispencers	Money Orders & Postal Cards	Equipment Maintenance	Other	Custodial & Building	Total
3rd Class: Single Piece	12		7		1010	1029
Bulk Regular			118		5008	5126
Bulk Nonprofit			44		2105	2149
4th Class: Parcel Post	81		31		2908	3020
Bound Printed Matter	1		12		284	197
Special Rate	43		24		2142	2209
Library Rate	11		9		400	519
Govt. Mail—Penalty—USPS			7		274	281
Other			54		1421	1475
Franked—Congress			1		53	54
Other					18	18
Free for Blind, Handicapped & Servicemen			1		72	73

	Short Run Variable				Longer Run Variable	
	Stamps & Dispencers	Money Orders & Postal Cards	Equipment Maintenance	Other	Custodial & Building	Total
International Mail:						
Surface Ltrs. & Cards	359		13		275	647
Other			1		342	343
2nd Class			1		17	18
Parcel Post			1		490	491
Airmail Ltrs. & Cards	665		23		490	1178
Other			1		122	123
Parcel Post			1		164	164
Special Services:						
Registry					1204	1204
Certified					156	156
Insurance					62	62
COD					41	41
Special Delivery	2				260	262
Money Orders		1735			872	2607
Stamped Envelopes					62	62
Special Handling					5	5

COST SEGMENT XV (SUPPLIES & SERVICES)
PRC TEST YEAR AFTER RATES
($000's)

	Short Run Variable				Longer Run Variable	
	Stamps & Dispencers	Money Orders & Postal Cards	Equipment Maintenance	Other	Custodial & Building	Total
Lock & Call Box					7835	7835
Other					665	665
Total Attributable	55088	1735	1983	—	63532	122338
Institutional						224825
Total Costs	55950	1735	7210	166764	115504	347163

APPENDIX J
CS XX
Page 259

COST SEGMENT XX (DEPRECIATION & SERVICE-WIDE COSTS)
PRC TEST YEAR AFTER RATES
($000's)

	Short-Run Indemn. & Ins. Claim Write-Offs	Longer Run CDC Vehicle Depreciation	Longer Run Spec. Del. Vehicle Depreciation	Longer Run Mail Process. Equipment Depreciation	Longer Run Building & Leasehold Depreciation	Longer Run Unemployment Compensation	Other Expenses	Total
1st Class: Ltrs. & Parcels		12,368		32,959	43,151	14,484		102,962
Presort Ltrs. & Parcels		4,383		2,747	6,428	2,762		16,320
Govt. Postal Cards		46		45	135	44		270
Private Post Cards		314		440	915	318		1,987
Presort Pvt. Post Cards		135		12	154	72		373
Priority Mail		97		687	5,281	452		6,517
Express Mail	85	71	232	119	382	172		1,061
Mailgrams		6		8	30	10		54
2nd Class: Within County		200		258	315	130		903
Regular Rate		1,415		2,639	3,619	1,187		8,860
Nonprofit		502		511	1,269	405		2,687
Classroom		7		35	22	7		71
Transient		13		84	87	24		208
3rd Class: Single Piece		272		1,840	1,713	425		4,250
Bulk Regular		4,963		5,331	8,172	3,290		21,756
Bulk Nonprofit		1,669		1,435	3,501	1,301		7,906

COST SEGMENT XX (DEPRECIATION & SERVICE-WIDE COSTS)
PRC TEST YEAR AFTER RATES
($000's)

	Short-Run	Longer Run					
	Indemn. & Ins. Claim Write-Offs	CDC Vehicle Depreciation	Spec. Del. Vehicle Depreciation	Mail Process. Equipment Depreciation	Building & Leasehold Depreciation	Unemployment Compensation	Other Expenses	Total
4th Class: Parcel Post		168		7,780	4,612	511		13,071
Bound Printed Matter		93		534	336	59		1,022
Special Rate		208		6,674	3,668	396		10,946
Library Rate		48		1,586	767	97		2,498
Govt. Mail—Penalty—USPS		213		392	494	167		1,266
Other		468		2,968	2,589	656		6,681
Franked—Congress		57		96	92	39		284
Other		13		86	36	12		147
Free for Blind, Handicapped & Servicemen		12		231	123	19		385
International Mail:								
Surface Ltrs. & Cards		34		362	497	143		1,036
Other		8		53	648	94		803
2nd Class		2		49	27	7		85
Parcel Post		10		33	897	71		1,011

	Short-Run	Longer Run						
	Indemn. & Ins. Claim Write-Offs	CDC Vehicle Depreciation	Spec. Del. Vehicle Depreciation	Mail Process. Equipment Depreciation	Building & Leasehold Depreciation	Unemployment Compensation	Other Expenses	Total
Airmail Ltrs. & Cards		106		540	924	272		1,842
Other		7		18	234	39		298
Parcel Post		8		6	286	27		327
Special Services:								
Registry	2,585	100			2,335	334		5,354
Certified		287			263	119		669
Insurance	20,300	74			102	37		20,513
COD	1,956	72			69	30		2,127
Special Delivery			409		530	67		1,006
Money Orders					1,516	258	48	1,822
Stamped Envelopes					108	17	8,389	8,514
Special Handling					10	2		12
Lock & Call Box					13,353	213		13,566
Other		234			1,259	377		1,870
Total Attributable	24,926	28,683	641	70,558	110,949	29,146	8,437	273,340
Institutional								85,205
Total Costs	24,926	47,116	1,640	70,558	110,949	44,900	58,456	358,545

Opposition

1

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

Nos. 81-1304 and 81-1381

In the Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
PETITIONER
v.
UNITED STATES POSTAL SERVICE, ET AL.

UNITED PARCEL SERVICE OF AMERICA, INC.,
PETITIONER
v.
UNITED STATES POSTAL SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE

REX E. LEE
Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

LOUIS A. COX
General Counsel

FRANCES G. BECK
Associate General Counsel
United States Postal Service
Washington, D.C. 20260

QUESTION PRESENTED

Whether the Postal Reorganization Act, 39 U.S.C. 3622(b), requires that postal rates and fees be fixed according to cost-of-service principles to the maximum extent possible.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Discussion 6

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Association of American Publishers, Inc. v. *USPS*, 485 F. 2d 768 3

Bus Employees v. *Missouri*, 374 U.S. 74 12

Carroll v. *President and Commissioners of Princess Anne*, 393 U.S. 175 12

Moore v. *Ogilvie*, 394 U.S. 814 11

Murphy v. *Hunt*, No. 80-2165 (Mar. 2, 1982) 11

Nader v. *Butz*, 474 F. 2d 426 12

National Association of Greeting Card Publishers v. *USPS*, 569 F. 2d 570, vacated, 434 U.S. 884 (*NAGCP I*) 3, 4, 7, 8, 10

National Association of Greeting Card Publishers v. *USPS*, appeal dismissed, No. 76-1611 (D.C. Cir. June 27, 1978) (*NAGCP II*) 3

National Association of Greeting Card Publishers v. *USPS*, 607 F. 2d 392, cert. denied, U.S. 1025 (*NAGCP III*) 3, 4-5, 7, 8, 10

Page

Cases—Continued:

Nebraska Press Association v. *Stuart*, 427 U.S. 539 12

Newsweek, Inc. v. *USPS*, 652 F. 2d 239 8

Reeves, Inc. v. *Stake*, 447 U.S. 429 11

Roe v. *Wade*, 410 U.S. 113 11

SEC v. *Sloan*, 436 U.S. 103 11

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 ..... 10, 11

Wirtz v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463 12

Statutes:

Postal Reorganization Act, 39 U.S.C. 101 *et seq.* 2

39 U.S.C. 3621 9

39 U.S.C. 3622 2

39 U.S.C. 3622(b) 2, 4, 5, 6, 7, 9

39 U.S.C. 3622(b)(1)-(2) 7

39 U.S.C. 3622(b)(3) 3

39 U.S.C. 3622(b)(4)-(9) 7

39 U.S.C. 3624 10

39 U.S.C. 3624(a) 2

39 U.S.C. 3624(d) 2

39 U.S.C. 3625 ..... 2, 8, 11

Page

Statutes—Continued:

39 U.S.C. 3625(d) 6, 12

39 U.S.C. 3628 ..... 2, 5, 9, 11

39 U.S.C. 3681 8

Pub. L. No. 94-421 Section 5(a), 90 Stat. 1306 10

Miscellaneous:

Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Service (Sept. 29, 1981) 12

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1304

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

No. 81-1381

UNITED PARCEL SERVICE OF AMERICA, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a)[1] is reported at 663 F. 2d 1186. The decision of the Governors of the United States Postal Service, dated March 10, 1981 (Pet. App. 1b-140b), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981. A petition for rehearing was denied on January 11, 1982. The petitions for a writ of certiorari were filed on January 12, 1982 (No. 81-1304), and January 25, 1982 (No. 81-1381). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1] "Pet. App." refers to the petition in No. 81-1304.

STATEMENT

This action arises out of the most recent general postal rate proceeding. On March 10, 1981, the Governors of the United States Postal Service allowed to take effect, under protest, a recommended decision of the Postal Rate Commission governing postal rates and fees. On petition for review, the court of appeals remanded the case for further consideration. Petitioners seek review of one aspect of that judgment.

1. When Congress enacted the Postal Reorganization Act, 39 U.S.C. 101 *et seq.* (the Act), in 1970, it relinquished the control it had traditionally exercised over the setting of postal rates and fees and the establishment of mail classes. Instead, it established the United States Postal Service and the Postal Rate Commission as agencies independent of each other, each with a role in setting rates.

Under 39 U.S.C. 3622, the Postal Service initiates a rate proceeding by requesting the Commission to recommend changes in rates or fees when "the Postal Service determines that such change would be in the public interest." The Postal Service submits proposed rates with its request. *Ibid.* After receiving the request, the Commission holds hearings on the proposed rates (39 U.S.C. 3624(a)) and then recommends a decision to the Governors (39 U.S.C. 3624(d)). The Governors may approve a decision recommended by the Commission, allow it under protest, reject it, or (in certain circumstances) modify it (39 U.S.C. 3625). A decision by the Governors that orders rates into effect may be appealed to any court of appeals by "an aggrieved party who appeared in the proceedings under [39 U.S.C.] 3624(a)" (39 U.S.C. 3628).

The Commission does not possess unfettered discretion in arriving at the rates it recommends to the Governors. 39 U.S.C. 3622(b) specifies nine considerations—in addition to the more general one of "the policies of [the Act]"—that

must guide the Commission in recommending changes in rates and fees. These factors reflect the breadth of Congress' concerns. They include such matters as the availability of other means of communication; the effect on competing enterprises; the social, cultural, and educational value of the mail; and, of particular relevance here, "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type" (39 U.S.C. 3622(b)(3)).

The postal rate proceeding involved in this case is the fifth such proceeding conducted under the Act. Review of each of the prior proceedings has taken place in the United States Court of Appeals for the District of Columbia Circuit.[2] That court has held that Section 3622(b)(3) is the dominant factor to be considered by the Commission in recommending rates. According to the D.C. Circuit, the Act requires a three-step approach: (1) the Commission must "attribute" to each class of mail or type of service those costs that, through variability theory and other inferences of causation, may reasonably be determined to result from providing the service in question; (2) the Commission must then implement the "reasonably assignable" requirement of Section 3622(b)(3) by distributing among the various mail

---

[2]Although each of the five proceedings established rates and fees for dozens of mail subclasses and special services, the proceedings are most conveniently identified by the rate each established for the first ounce of First-Class mail. The first four proceedings were reviewed in: *Association of American Publishers, Inc.* v. *USPS*, 485 F. 2d 768 (D.C. Cir. 1973) (eight-cent rate); *National Association of Greeting Card Publishers* v. *USPS*, 569 F. 2d 570 (D.C. Cir. 1976), vacated, 434 U.S. 884 (1977) (*NAGCP I*) (10-cent rate); *National Association of Greeting Card Publishers* v. *USPS*, appeal dismissed, No. 76-1611 (D.C. Cir. June 27, 1978) (*NAGCP II*) (13-cent rate); *National Association of Greeting Card Publishers* v. *USPS*, 607 F. 2d 392 (D.C. Cir. 1979), cert. denied, 444 U.S. 1025 (1980) (*NAGCP III*) (15-cent rate).

classes and services the portion of all remaining costs that may reasonably be assigned on the basis of the best available cost-of-service estimates; and (3) finally, in allocating any other costs that are not "reasonably assignable," the Commission must consider the other factors listed in Section 3622(b). *National Association of Greeting Card Publishers* v. *USPS*, 569 F. 2d 570, 589 (D.C. Cir. 1976), vacated as to other issues, 434 U.S. 884 (1977) (*NAGCP I*); *National Association of Greeting Card Publishers* v. *USPS*, 607 F. 2d 392, 400 (D.C. Cir. 1979), cert. denied, 444 U.S. 1025 (1980) (*NAGCP III*).

By contrast, in the first three general rate proceedings the Postal Service and the Commission read Section 3622(b) to require a two-step process for allocating postal costs. The first step was to determine which direct and indirect costs could be attributed to specific mail classes and services based on volume variability. Approximately half of the postal system's costs were attributed in this fashion. The second step was to "assign" the remaining costs on the basis of the non-cost factors listed in Section 3622(b) (Pet. App. 12a). In response to the D.C. Circuit's direction in *NAGCP I*, the Postal Service in the fourth general rate proceeding (the 15-cent rate proceeding) proposed an additional step, *i.e.*, "assigning" costs according to a concept of Service-Related Costs (SRC). SRC assumed that, were it not for certain categories of mail, the Postal Service would only operate on a three-day-a-week schedule. The Service thus "assigned" to those categories (First Class, second class, and parcels) the fixed costs of delivery representing the difference between this hypothetical schedule and a six-day-a-week schedule. The Commission expressed its dissatisfaction with the three-tier approach in the fourth general rate proceeding (*id.* at 15a-16a), as did the Postal Service when it allowed under protest the recommendation of the Commission in the most recent, fifth, proceeding (*id.* at 12b-14b).

The D.C. Circuit, however, approved the use of the SRC concept. *NAGCP III, supra*, 607 F. 2d at 404-408.

2. This action was initiated under 39 U.S.C. 3628 by parties who had appeared in the proceedings before the Commission, appealing the March 10, 1981 decision by the Governors to allow the Commission's recommended decision to take effect under protest. A primary issue in the appeal was the proper interpretation of Section 3622(b). Several parties argued that the rates were unlawful because they were based on the D.C. Circuit's improper construction of that section. Others agreed generally with the D.C. Circuit's interpretation, but challenged SRC as an irrational way of assigning costs. The Postal Service, although it defended the Governors' decision to allow the changes to take effect under protest, argued that the D.C. Circuit's reading of Section 3622(b) was improper and rejected the SRC concept (Pet. App. 5a-6a).

The court of appeals remanded the case for reconsideration in light of the rate-setting principles it announced. The court held that, although the Commission was free to recommend rates in accordance with the D.C. Circuit's interpretation of Section 3622(b), the Act also allowed other methods of setting rates that adhered less strictly to fully distributed cost techniques. In particular, the Commission was free, if it wished, to abandon SRC as an additional step in allocating costs (Pet. App. 19a-32a, 48a).[3] The judgment of the court of appeals was entered on November 2, 1981.

---

[3]The court of appeals also held that that Commission's reduction of the Postal Service's requested revenues by about $1 billion was an improper encroachment on the authority of the Board of Governors (Pet. App. 32a-38a). In addition, the court upheld a variety of particular findings by the Commission concerning the rates charged for magazines, parcel post, and presorted mail, and affirmed several minor

3. After the petitions for review of the Governors' March 10, 1981 decision were filed, but prior to the court of appeals' decision, the Commission issued a second recommended decision substantially reaffirming its earlier recommendation. On June 22, 1981, the Governors rejected the second recommendation. After the Commission, on September 17, 1981, again refused to alter its recommended decision, the Governors exercised their statutory authority to modify the decision. 39 U.S.C. 3625(d). Among other changes, the Governors increased the price of a First-Class postage stamp to 20 cents effective November 1, 1981 (Pet. App. 10a n.4, 32a n.14).[4]

DISCUSSION

The decision of the court of appeals conflicts with decisions in the District of Columbia Circuit interpreting Section 3622(b). This conflict will subject future postal rate proceedings to great uncertainty. The Postal Service therefore believes that this case is appropriate for review by this Court.

1. In assessing the lawfulness of rates and fees in general postal rate proceedings, the most salient issue is the allocation of Postal Service costs among the numerous categories of mail.[5] With regard to that issue, the court of appeals in this case stated that the Commission would comply with the statute if, as it did in the second general rate proceeding, it "attributed" only 50% of postal costs according to cost-of-service principles, and "assigned" the remaining costs

---

"modifications" made by the Governors to the Commission's recommended decision (*id.* at 38a-48a). Those aspects of the decision below are not challenged by petitioners.

[4]The Commission had recommended an 18-cent rate (Pet. App. 2b-3b).

[5]A schedule of the classes of mail and the rates and fees set by the Governors' March 10 decision is reprinted at Pet. App. 27b-140b.

according to the factors—such as the value of service to sender and recipient, simplicity of structure for the entire schedule, and the educational, cultural, or scientific value of the mail matter—listed in 39 U.S.C. 3622(b)(1)-(2), (4)-(9). Pet. App. 27a. The District of Columbia Circuit, on the other hand, has held that the Commission must "attribute" to each class not only the 50% or more of costs that vary with volume,[6] but also those fixed costs that may reasonably be inferred to result from providing the service. *NAGCP I, supra*, 569 F. 2d at 589. It must then "assign" the remaining costs to the maximum extent possible according to cost-of-service principles. *Ibid.*; *NAGCP III, supra*, 607 F. 2d at 401. The concept of Service-Related Costs was an attempt to respond to this second phase of the allocation process. Only after assigning costs to the fullest extent possible may the Commission distribute the residual costs among the various classes according to the other factors enumerated in Section 3622(b).

The result of this conflict is that if the Commission, in future rate proceedings, follows the approach approved by the Second Circuit, the lawfulness of the resulting rates will be determined by a race to the courthouse. Those mail users or competitors who favor the maximum allocation of costs of service will seek review in the D.C. Circuit; those who favor the more discretionary approach will seek review in the Second Circuit. That is precisely what happened in this case: respondents Newsweek, Inc., Time, Inc., and Magazine Publishers Association, Inc., filed petitions for review

---

[6]In *NAGCP I* the D.C. Circuit rejected as insufficient the Commission's attribution of 52.2% of all costs according to principles of volume variability. 569 F. 2d at 582. In *NAGCP III* the Commission attributed 65% of costs based on volume variability. Because no party challenged that figure as insufficient, the court did not consider whether the failure to make greater attribution through the use of other cost accounting principles was inconsistent with the court's direction in *NAGCP I*. *NAGCP III, supra*, 607 F. 2d at 405-406.

in the Second Circuit four minutes after the Governors' March 10, 1981 decision was time-stamped; petitioner United Parcel Service filed a petition for review in the D.C. Circuit several days later. See *Newsweek, Inc.* v. *USPS*, 652 F. 2d 239, 241 (2d Cir. 1981).[7]

The conflict about the applicable costing methodology may also have the effect of prolonging the rate-making process by producing disagreement between the Governors of the Postal Service and the Postal Rate Commission. For example, in the fifth general rate proceeding at issue in this case, the Governors announced their intention to depart from SRC as a method of "assigning" costs. The Commission, feeling itself bound by the rulings in *NAGCP I* and *NAGCP III*, made its recommended decision on the basis of SRC (Pet. App. 28a). When the effect of such conflicts is that the Governors reject, or allow under protest, the Commission's recommended decision, a final determination of rates must await resolution of the conflict through compromise, modification, or judicial review. See 39 U.S.C. 3625.

The uncertainty engendered by the disagreement between the courts of appeals has a significant financial impact both on the Postal Service and on users and competitors of the mail service. The Postal Service determined that its revenue requirement for the year ending March 20, 1982 would be $22.9 billion and that its proposed rates and fees would

---

[7]The cases were consolidated in the Second Circuit. The same sequence occurred after the Governors' September 29, 1981 decision to modify the Commission's recommended decision. The National Association of Greeting Card Publishers filed in the D.C. Circuit on September 30, 1981. *National Association of Greeting Card Publishers* v. *USPS*, No. 81-2063. Petitions for review were filed moments earlier in the Second Circuit. *Time, Inc.* v. *USPS*, No. 81-4183 (2d Cir., filed Sept. 30, 1981). The cases were again consolidated in the Second Circuit.

increase revenues by $3.75 billion (Pet. App. 9a). Delay in the implementation of a proposed schedule could ultimately affect the mail services themselves, given the statutory mandate of practicable cost/revenue equilibrium. 39 U.S.C. 3621. Moreover, the dispute over the proper interpretation of Section 3622(b) reduces at the most tangible level to a conflict about the prices to be charged for different classes of mail, some of which compete with enterprises in the private sector of the economy. The need to resolve that uncertainty justifies review by this Court.

2. The Governors' modification of the Commission's recommended decision does not render this case moot. On March 10, 1981, the Governors issued their decision to allow the Commission's recommended decision (which included 18-cent First Class rates) to take effect under protest. On September 29, 1981, the Governors modified the recommendation and announced a new schedule (which included 20-cent First Class rates) effective November 1, 1981. The court of appeals' judgment was entered on November 2, 1981. The Act provides that any decision by the Governors approving, allowing under protest, or modifying a recommended decision is reviewable in any court of appeals. 39 U.S.C. 3628. It also precludes other methods of review, *ibid.*, and forms of relief, including reimbursement for amounts paid under rates subsequently determined to be unlawful. 39 U.S.C. 3681. A finding of mootness would consequently render the 18-cent rate schedule impervious to any further judicial oversight.

That result might be tolerable if this case presented a unique instance in which a rate schedule escaped review, but the same result has occurred before and is likely to recur. The second general rate proceeding established a 10-cent rate on September 4, 1975. A challenge to that schedule was filed by the National Association of Greeting Card Publishers in the D.C. Circuit, but before the case was decided the

13-cent rate schedule became effective on July 18, 1976. *NAGCP I, supra*, 569 F. 2d at 578 n.21. Petitions for review of the third general rate proceeding (the 13-cent rate) were filed in the D.C. Circuit, but before the case was decided the fourth general rate proceeding (the 15-cent rate) had taken place. *NAGCP III, supra*, 607 F. 2d at 396 n.3. Cognizant of the practical difficulties of obtaining review of any particular decision in this cycle, the D.C. Circuit held in *NAGCP I* that the issue of cost allocation was not moot because it was "capable of repetition, yet evading review." *NAGCP I, supra*, 569 F. 2d at 578 n.21.

Those examples demonstrate that it has been difficult to obtain review of final effective rates, implemented when the Governors approve the Commission's recommendation.[8] The fifth general rate proceeding was the first time the Governors allowed rates to go into effect under protest, in part because of disagreement with the Commission about the applicable rules for cost allocation. Less than eight months later the Governors exercised their statutory option to modify the recommended decision. The result of the court of appeals' decision in this case is to increase the probability of similar, short-term, interim rates in future proceedings. Because it subjects the issue of cost allocation to two conflicting rules, the Second Circuit's decision makes it more likely that the discord between the courts of appeals might impair the harmony between the Postal Service and the Commission.

These circumstances strongly suggest that the issue here is one that is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515

---

[8]In 1976 Congress amended 39 U.S.C. 3624 to require that the Commission issue a recommended decision within 10 months of the Postal Service's request for a rate change. Pub. L. No. 94-421, Section 5(a), 90 Stat. 1306.

(1911). As a preliminary matter, there is more than a "reasonable expectation" that petitioners will be affected by future rate proceedings. See *Murphy* v. *Hunt*, No. 80-2165 (Mar. 2, 1982), slip op. 4-5; *SEC* v. *Sloan*, 436 U.S. 103, 108-110 (1978). At least one of them has sought judicial review of each general rate proceeding since the Act was passed. See cases cited in note 2, *supra*. Moreover, the question of cost allocation will necessarily be a central issue in any future rate proceeding. Finally, it is likely that future rates allowed under protest, and perhaps even ultimately determined rates, will evade review if this case is determined to be moot. The 18-cent rates allowed under protest in this proceeding were in effect for less than eight months. And the length of time that elapses between general rate proceedings is affected not just by increases in the volume of mail and the rate of inflation, but by the length of those proceedings themselves. Such brief periods have in the past been demonstrably insufficient to permit review in the courts of appeals, as contemplated by 39 U.S.C. 3628, much less review in this Court. *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 434 n.5 (1980); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969). Cf. *Southern Pacific Terminal Co.* v. *ICC, supra*, 219 U.S. at 516.

The controversy in this case is "capable of repetition" in a second sense as well. The decision to modify made by the Governors on September 29, 1981, was itself appealed, and petitions for review of that action are currently pending before the Second Circuit. *Time, Inc.* v. *USPS*, No. 81-4183 (2d Cir., filed Sept. 30, 1981). Petitioner United Parcel Service has argued in that action that the Governors' decision to modify is inconsistent with 39 U.S.C. 3625; others have claimed that the Governors failed adequately to explain their decision. If the Second Circuit should find the decision to modify unlawful and suspends the rates implemented by that decision, the effective rates then could be

those ordered into effect on March 10, 1981. Cf. *Nebraska Press Association* v. *Stuart*, 427 U.S. 539, 546 (1976).

The controversy over the 18-cent rate schedule is not moot for still a third reason. The Governors' modified rate schedule and the 18-cent schedule put in effect on March 10, 1981, are both steps in the same general rate proceeding. Both are based on the same record, 39 U.S.C. 3625(d), and the modification effected by the Governors did not purport to undo every recommendation of the Commission. For example, it left in effect all the Commission's recommended fees for special postal services. *Decision of the Governors of the United States Postal Service on Rates of Postage and Fees for Postal Service* at 24 (Sept. 29, 1981). More relevant for present purposes, it left untouched the fourth-class parcel post rates about which petitioner United Parcel Service complains. *Id.* at 21-22. See 81-1381 Pet. 11. The 18-cent rate schedule thus "continues to play a substantial role" in the schedule of rates and fees fixed by the Governors in their decision to modify. *Carroll* v. *President and Commissioners of Princess Anne*, 392 U.S. 175, 178 (1968); *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463 (1968); *Bus Employees* v. *Missouri*, 374 U.S. 74, 78 (1963); *Nader* v. *Butz*, 474 F. 2d 426, 428-429 (D.C. Cir. 1972).

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

LOUIS A. COX
General Counsel

FRANCES G. BECK
Associate General Counsel
United States Postal Service

MARCH 1982

DOJ-1982-03

Opposition

2

Nos. 81-1304 and 81-1381

Supreme Court, U.S.
FILED
MAR 26 1982
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF OF DIRECT MAIL/MARKETING ASSOCIATION, INC. IN OPPOSITION

DANA T. ACKERLY
Counsel of Record
CHARLES LISTER
DAVID K. FLYNN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Direct Mail/ Marketing Association, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
I. A Second Set of Appeals From PRC Docket No. R80-1 Is Pending Before The Second Circuit	2
II. The *Time* Appeals Raise Issues Of Fundamental Importance	5
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:	Page
Newsweek, Inc. v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981)	2, *passim*
Time Incorporated v. *United States Postal Service*, Nos. 81-4183 *et al.* (2d Cir., filed Sept. 29, 1981)	4, *passim*
STATUTES:	
Postal Reorganization Act, 39 U.S.C. §§ 101 *et seq.*	4, *passim*
39 U.S.C. § 201	5
39 U.S.C. § 3601	5
39 U.S.C. § 3622	5
39 U.S.C. § 3625	6
39 U.S.C. § 3628	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1304

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

No. 81-1381

UNITED PARCEL SERVICE OF AMERICA, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF OF DIRECT MAIL/MARKETING ASSOCIATION, INC. IN OPPOSITION

INTRODUCTION

On January 12, 1982, the National Association of Greeting Card Publishers filed a Petition for a Writ of Certiorari with this Court ("NAGCP Petition"), which seeks to have this Court

review the judgment of the United States Court of Appeals for the Second Circuit in *Newsweek, Inc.* v. *United States Postal Service*, 663 F.2d 1186 (1981) (*"Newsweek"*). On January 25, 1982, United Parcel Service of America filed a second petition ("UPS Petition") seeking review of the *Newsweek* decision. Direct Mail/Marketing Association, Inc. ("DMMA") submits this Brief in response to the NAGCP and UPS Petitions.

DMMA is an association of approximately 2500 member companies and is the largest organization representing firms involved in marketing by mail. The member companies of DMMA are substantial users, directly or indirectly, of third-class bulk regular ("BRR") mail and also utilize all the other major classes of mail. DMMA was a party both to the *Newsweek* litigation and to the administrative proceedings before the Postal Rate Commission (the "Commission" or the "PRC") in Docket No. R80-1, from which the *Newsweek* litigation arose.

DMMA does not challenge the substance of the NAGCP and UPS Petitions. DMMA does, however, wish to alert this Court to the pendency of a second group of appeals also arising from PRC Docket No. R80-1 and to suggest that, in the interest of judicial economy, the NAGCP and UPS Petitions be held pending petitions for certiorari in those appeals, so that a unified briefing schedule can be established for questions presented by both Second Circuit decisions.

ARGUMENT

I. A Second Set Of Appeals From PRC Docket No. R80-1 Is Pending Before The Second Circuit.

The administrative proceeding reviewed by the Second Circuit in its *Newsweek* opinion did not terminate with the decision of March 10, 1981 made by the Governors of the United States Postal Service ("Postal Service" or "USPS").[1] As the NAGCP

[1] *See generally* Decision of the Governors of the United States Postal Service, PRC Docket No. R80-1 (March 10, 1981) (the "First Decision").

Petition recognizes,[2] the Governors' action not only increased the rates for many classes of mail, it also returned the matter to the Commission for reconsideration.[3]

Subsequently, on June 4, 1981, the PRC issued a recommended decision upon reconsideration, in which it reiterated virtually all of its initial recommendations.[4] On June 29, 1981, the Governors again rejected the PRC's recommendations, and again the Postal Service resubmitted its request to the PRC.[5] On September 17, 1981, the PRC "affirm[ed the] recommended rates and classification changes that [it] recommended in [its] June 4, 1981, R80-1 decision on reconsideration."[6]

Finally, on September 30, 1981, the Governors implemented substantial changes in the rates for many classes, asserting the authority to "modify" PRC recommended decisions under 39 U.S.C. § 3625(d).[7]

Many of the same parties who brought the *Newsweek* appeals have challenged the Governors' September 30 "modifications"

The rates implemented by the First Decision became effective March 22, 1981 and included an 18-cent first-class stamp. These rates will be referred to collectively as the "March Rates."

[2] NAGCP Petition 7.

[3] First Decision 1, 4.

[4] Opinion and Recommended Decision Upon Reconsideration, PRC Docket No. R80-1 (June 4, 1981).

[5] Decision of the Governors of the United States Postal Service, PRC Docket No. R80-1 (June 29, 1981) (the "Second Decision").

[6] Opinion and Recommended Decision Upon Further Reconsideration, PRC Docket No. R80-1 (September 17, 1981), ¶ 187.

[7] Decision of the Governors of the United States Postal Service, PRC Docket No. R80-1 (dated September 29, 1981; released September 30, 1981) (the "Third Decision"). The rates implemented by the Third Decision became effective November 1, 1981 and included a 20-cent first-class stamp. These rates will be referred to collectively as the "November Rates."

in the Second Circuit. *See Time Incorporated* v. *United States Postal Service*, Nos. 81-4183, *et al.* (2d Cir., filed Sept. 30, 1981) (the "*Time* cases" or "*Time* appeals"). This second group of appeals involves some of the most fundamental aspects of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.*, including the ultimate division of authority between the USPS Governors, the USPS Board of Governors and the Postal Rate Commission. *See* pp. 5-7, *infra*.

The *Time* cases have been briefed fully in the Second Circuit, and oral argument is expected to be heard shortly. In view of the diversity of interests represented, one or more petitions for certiorari may be expected to be filed with this Court following the Second Circuit's decision, regardless of the Second Circuit's resolution of the issues before it.

If the NAGCP or UPS Petition is granted in the near future, a briefing schedule will be established, and the issues involved in *Newsweek* will be briefed and argued separately from any issues arising from the *Time* appeals. In the interests of efficiency in briefing, argument and judicial deliberation, this Court should treat as a unit all the issues from both the *Newsweek* and the *Time* appeals as to which it grants certiorari. All such issues will be closely interrelated and will have arisen during the course of a single administrative proceeding, PRC Docket No. R80-1.

There is another reason for deferring action. The November Rates are the rates that will, as a practical matter, be affected by a decision on the *Newsweek* issues. The lawfulness of the November Rates, however, also depends upon the resolution of the additional issues raised in the *Time* appeals. In the interests of efficiency and economy of effort, this Court should not treat a single set of rates in piecemeal fashion.

Accordingly, DMMA respectfully suggests that this Court defer ruling on the NAGCP and UPS Petitions until it can

consider any petitions that may be filed following the Second Circuit's *Time* decision.

II. The *Time* Appeals Raise Issues Of Fundamental Importance.

The November Rates are identical in many respects to the rates that had been proposed by the Postal Service at the inception of Docket No. R80-1 and rejected by the Commission following extensive hearings. Thus, in their Third Decision the Governors effectively substituted their judgment for that of the Postal Rate Commission on a broad variety of postal ratemaking issues.

One, but only one, of these issues involved Section 3622(b)(3), which is fundamental to postal ratemaking and which is the subject of the NAGCP and UPS Petitions.

The Third Decision raises other issues even more fundamental, because they deal with the locus of the final, discretionary, decision-making authority and the conditions under which such authority may be exercised.

For example, in their Third Decision the Governors asserted the right to approve or reject costing techniques, including the "service-related costs" ("SRC") methodology.[8] The *Newsweek* decision upholding SRC was rendered following the approval of SRC by one "independent establishment of the executive branch," the PRC.[9] The Governors of the USPS, another "independent establishment of the executive branch,"[10] have now rejected SRC. As a result, the status of SRC remains unresolved, and a fundamental question exists as to which "independent establishment" has the final authority to approve costing methodologies.

---

[8] Third Decision 16-18.

[9] 39 U.S.C. § 3601(a) (1976).

[10] 39 U.S.C. § 201 (1976).

Moreover, in many instances the conclusions reached in the Third Decision are stated with little or no reference to, or supporting analysis of, the evidence of record. The brevity of the Third Decision is in stark contrast to the detail contained in the Commission's three recommended decisions. Several parties have challenged the Third Decision's "statement of explanation and justification"[11] as inadequate, raising fundamental questions regarding the extent of the Governors' obligation to justify their "modifications" based on the evidence adduced before the PRC.

Indeed, several parties have asserted that the Governors did not have the authority to "modify" the PRC recommendations in the first place. In this respect, the *Time* appeals raise the most fundamental issues concerning the relationship between the PRC and the USPS: the locus of the *final* final decision-making authority and the parameters within which this authority shall be exercised.

Finally, the *Time* appeals involve several questions regarding the roles of the various federal courts. Following the Third Decision, DMMA brought an action in the District Court for the Southern District of New York seeking to enjoin implementation of the November BRR Rates on the ground that the Governors did not have statutory authority to implement permanent BRR rates under 39 U.S.C. § 3625. The District Court dismissed DMMA's case, holding that 39 U.S.C. § 3628 provides for exclusive review in the courts of appeals, even where the Postal Service merely purports to act under the permanent rate provision, 39 U.S.C. § 3625. DMMA's appeal from this dismissal has been consolidated with the other *Time* cases. Thus, the *Time* appeals raise the question of the scope of the exclusivity-of-review provision of Section 3628, and specifically whether the Governors may avoid the injunctive power of

---

[11] *See* 39 U.S.C. § 3625(e) (1976).

federal district courts merely by asserting that they are acting under their permanent rate authority.

CONCLUSION

The *Newsweek* issues involve basic aspects of postal rate-making. The *Time* appeals, however, involve even more fundamental questions regarding the authority of the administrative agencies (and of the federal courts) where there is disagreement as to appropriate rates or costing methodologies.

Deferring action on the NAGCP and UPS Petitions will promote judicial economy by permitting review in one proceeding of all questions presented by PRC Docket No. R80-1. Moreover, it will give this Court the benefit of a full administrative record and the expression of the views of the Second Circuit on all issues raised during the course of this proceeding.

Respectfully submitted.

DANA T. ACKERLY
Counsel of Record
CHARLES LISTER
DAVID K. FLYNN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Direct Mail/ Marketing Association, Inc.

March 1982

Opposition

3

Supreme Court, U.S.
FILED
MAR 23 1982
ALEXANDER L. STEVAS
CLERK

Nos. 81-1304 and 81-1381

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,
v.
UNITED STATES POSTAL SERVICE, *et al.*,
Respondents,
and
UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,
v.
UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOINT MEMORANDUM OF RESPONDENTS DOW JONES & COMPANY, INC. AND NEWSWEEK, INC. IN SUPPORT OF CERTIORARI

TONI K. ALLEN *
ROBERT M. LICHTMAN
WALD, HARKRADER & ROSS
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

DIANA M. DANIELS
NEWSWEEK, INC.
444 Madison Avenue
New York, New York 10022
(212) 350-2530
Counsel for Newsweek, Inc.

RAYMOND N. SHIBLEY *
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

W. GILBERT FAULK, JR.
DOW JONES & COMPANY, INC.
Post Office Box 300
Princeton, New Jersey 08540
(609) 452-2000
Counsel for Dow Jones & Company, Inc.

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Was the Court below correct in accepting the Postal Service's original interpretation of the ratemaking standards in Section 3622(b) of the Postal Reorganization Act, and disavowing the holdings of the District of Columbia Circuit which had construed Section 3622(b) to require a three-tier costing method under which cost-of-service formulae are applied to the maximum extent possible, thereby emphasizing only one of the nine statutory factors?

LIST OF PARTIES IN THE COURT BELOW

The parties to the proceeding below are listed in the Petitions. Except for wholly-owned subsidiaries, the affiliates of Dow Jones & Company, Inc. are as follows:

Dow Jones Publishing Company (Asia), Inc.
F.F. Sovcy, Inc.
Bear Island Paper Company
Teleprinter Leasing Corp.
Far Eastern Economic Review Ltd.
South China Morning Post Limited
Nikkei International Ltd.
Extel Corporation
Times Business Publications Limited
Financial Publications SDN, BHD
Insight Publications S.A.
New Nations, Singapore
Straits Times Press, Ltd.
The Press Enterprise Company
Continental Cablevision

The parent company of Newsweek, Inc. is The Washington Post Company. Except for wholly-owned subsidiaries, the affiliates of Newsweek, Inc. are as follows:

The Daily Herald Company
International Herald Tribune S.A.
Newsprint, Inc.
Bear Island Paper Company
Los Angeles Times-Washington Post
News Service, Inc.
Post-Newsweek Stations, Inc.
Post-Newsweek Productions, Inc.
Post-Newsweek Stations, Connecticut, Inc.
Post-Newsweek Stations, Florida, Inc.
Post-Newsweek Stations, Michigan, Inc.
Robinson Terminal Warehouse Corporation
Bowater Mersey Paper Company, Ltd.
Publishers Phototype, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
REASONS FOR GRANTING THE WRIT	2
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:

Association of American Publishers, Inc. v. Governors of United States Postal Service, 485 F.2d 768 (D.C. Cir. 1973)	2
National Association of Greeting Card Publishers v. United States Postal Service, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977)	2, 3, 4
National Association of Greeting Card Publishers v. United States Postal Service, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980)	2, 3, 4
Newsweek, Inc. v. United States Postal Service, 663 F.2d 1186 (2d Cir. 1981)	1, 2
Udall v. Tallman, 380 U.S. 1 (1965)	4
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	4

TABLE OF AUTHORITIES—Continued

STATUTES:

	Page
Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.*	2
39 U.S.C. § 3622(b)	2, 3, 5
39 U.S.C. § 3622(b)(1)	3
39 U.S.C. § 3622(b)(2)	3
39 U.S.C. § 3622(b)(3)	3
39 U.S.C. § 3622(b)(4)	3
39 U.S.C. § 3622(b)(5)	3
39 U.S.C. § 3622(b)(6)	3
39 U.S.C. § 3622(b)(7)	3
39 U.S.C. § 3622(b)(8)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1304 and 81-1381

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents,

and

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

JOINT MEMORANDUM OF RESPONDENTS DOW JONES & COMPANY, INC. AND NEWSWEEK, INC. IN SUPPORT OF CERTIORARI

Respondents Dow Jones & Company, Inc. ("Dow Jones") and Newsweek, Inc. ("Newsweek") hereby support the issuance of a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in *Newsweek, Inc. v. United States Postal Service*, 663 F.2d 1186 (1981). If the Writ of Certiorari is granted, Dow Jones and News-

week will urge affirmance of the conclusion of the Court of Appeals as to the Question Presented above.

OPINION BELOW

The opinion of the Court of Appeals, appearing in Appendix A to the Petition of National Association of Greeting Card Publishers ("NAGCP") in No. 81-1304, is now reported at 663 F.2d 1186.

REASONS FOR GRANTING THE WRIT

As a consequence of the decision below,[1] the Second Circuit and the D.C. Circuit are directly at odds over the proper interpretation of Section 3622(b) of the Postal Reorganization Act of 1970 ("the Act"), as amended, 39 U.S.C. §§ [illegible]1 *et seq.*[2] That section prescribes the standards for fixing postal rates and contains nine criteria to be considered by the Postal Rate Commission ("the Commission") and the Governors of the Postal Service in setting rates. Its ultimate interpretation by the courts will determine the course to be followed in all future postal ratemakings. Given the conflict between the circuits and the enormous impact of postal rates on the nation, issuance of the Writ sought by the Petitioners is plainly warranted.

The disagreement between the two circuits centers on whether Section 3622(b) imposes a requirement that postal costs be distributed on cost-of-service principles "to

---

[1] *Newsweek, Inc. v. United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981).

[2] *Compare National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570 (per curiam) (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) (*"NAGCP I"*); *National Association of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979) (per curiam), *cert. denied*, 444 U.S. 1025 (1980) (*"NAGCP III"*); *see also Association of American Publishers, Inc. v. Governors of United States Postal Service*, 485 F.2d 768 (D.C. Cir. 1973).

the maximum extent possible" as held by the D.C. Circuit —or on the basis of all of the statutory criteria, including the value considerations listed in that section of the Act. Pet. App. 26a. Stated another way, the D.C. Circuit has insisted upon the dominance of one criterion, subsection 3622(b)(3), to the virtual exclusion of the other eight listed in Section 3622(b).[3]

In *NAGCP I*, the D.C. Circuit reviewed a general rate proceeding under the Act in which the Commission and the Governors were in agreement with each other as to the Section 3622(b) allocation procedure; they interpreted the statute to require a two-step process for allocating postal costs, under which those that varied with volume were allocated as "attributable" costs to specific classes of mail and all other costs were assigned among the classes based on the factors set forth in subsections (1), (2), (4), (5), (6), (7) and (8) of Section 3622(b).[4] The D.C. Circuit, however, disagreed and interpreted Section 3622(b) as requiring a three-step process for allocating postal costs, including an intermediate "reasonably assignable" tier. Under this approach, both "attributable" and "assignable" costs would be allocated by using cost-of-service principles to the maximum extent possible; the remaining costs would be allocated by applying the eight non-cost factors of Section 3622(b). In *NAGCP III*, the D.C. Circuit again adhered to its three-tier interpretation of Section 3622(b)(3). *See generally* Pet. App. 13a-18a.

The Postal Service's application for new rates and fees in this proceeding reflected a three-tier costing approach because the agency, although disagreeing, felt constrained to follow the decisions of the D.C. Circuit. Similarly, the Commission's recommendations on that application fol-

---

[3] Except as otherwise noted in this memorandum, the procedural history of the proceeding for which the Writ of Certiorari is sought is adequately set forth in the Petitions.

[4] An additional non-cost criteria was added in 1976.

lowed the three-tier approach mandated by the D.C. Circuit in *NAGCP I* and *NAGCP III*. The Governors, despite their substantial disagreement with the Commission,[5] permitted the recommended rates to become effective with certain exceptions.[6]

On review of the Governors' decision, the Second Circuit remanded the case, sharply disagreeing with the D.C. Circuit on the fundamental issue of the proper costing methodology to be used:

> From our "plain reading" of the statute and review of its legislative history we conclude that the D.C. Circuit erred in *NAGCP I* and *III* in holding that section 3622(b) requires the PRC [the Commission] to attribute and assign costs to the maximum extent possible using cost-of-service principles.

Pet. App. 26a.

The Second Circuit held that opinions of this Court oblige reviewing courts to defer to the agency's interpretation of the statute[7] and that the D.C. Circuit failed to observe this requirement in *NAGCP I* and *NAGCP III*. Pet. App. 19a-20a.

As matters now stand, the two circuits are in total disagreement on the correct interpretation of the governing statute, and the validity of postal rate orders issued by the Governors will depend on the circuit in which

---

[5] This disagreement focused on the revenue requirement reflected in the recommendation, the propriety of the costing approach and the use of the "service-related" cost concept to assign certain hypothetical fixed delivery costs.

[6] Regarding the use of the "service-related" delivery cost scheme, the Governors concluded that the concept was "patently unrealistic." Pet. App. 12b.

[7] *See, e.g., Udall v. Tallman*, 380 U.S. 1 (1965); *see also Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Both the Postal Service and the Commission had adhered to a two-step interpretation until the D.C. Circuit intruded.

review is obtained. Such a situation should not be permitted to continue. The Court should take this opportunity to decide upon the proper construction of Section 3622(b). The Writ should issue and, upon review, the judgment and opinion of the Second Circuit be affirmed.

CONCLUSION

The Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

TONI K. ALLEN *
ROBERT M. LICHTMAN
WALD, HARKRADER & ROSS
1300 19th Street, N.W.
Washington, D.C. 20036
(202) 828-1200

DIANA M. DANIELS
NEWSWEEK, INC.
444 Madison Avenue
New York, New York 10022
(212) 350-2530
Counsel for Newsweek, Inc.

RAYMOND N. SHIBLEY *
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

W. GILBERT FAULK, JR.
DOW JONES & COMPANY, INC.
Post Office Box 300
Princeton, New Jersey 08540
(609) 452-2000
Counsel for Dow Jones & Company, Inc.

* *Counsel of Record*

Dated: March 1982

Petitioner's Brief

1

Office - Supreme Court, U.S.
FILED
JUL 2 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304, 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC., *Petitioner,*

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PETITIONER NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

MATTHEW S. PERLMAN
Counsel of Record
RICHARD J. WEBBER
CORALYN G. MANN
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6279

Counsel for Petitioner National Association of Greeting Card Publishers

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the requirement of section 3622(b) (3) of the Postal Reorganization Act that each mail class "bear the direct and indirect postal costs attributable to the class . . . plus that portion of all other costs . . . reasonably assigned to such class" requires usage of cost-of-service principles to the maximum extent reasonably possible?

2. Whether the Postal Rate Commission's allocation of costs based upon a hypothetical "service-related costs" methodology, combined with the Commission's failure to utilize other accounting formulae, was arbitrary, capricious, illegally discriminatory against first class mail, and inconsistent with statutory requirements?

PARTIES TO PROCEEDING BELOW

American Business Press, Inc.
American Cancer Society
American Lung Association
Association of American Publishers, Inc.
Classroom Publishers Association
Council of Public Utility Mailers
Direct Mail/Marketing Association, Inc.
Dow Jones & Company, Inc.
International Labor Press Association, AFL-CIO/CLC
Magazine Publishers Association, Inc.
Mail Order Association of America
March of Dimes Birth Defects Foundation
National Easter Seal Society
National Wildlife Federation
Newsweek, Inc.
Parcel Shippers Association
Reader's Digest Association, Inc.
Recording Industry Association of America, Inc.
St. Jude Children's Research Hospital
Time, Inc.
Warshawsky & Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
1. The Postal Reorganization Act of 1970	2
2. Docket R71-1—The First General Rate Proceeding	5
3. Docket R74-1—The D.C. Circuit Interprets Section 3622(b)	7
4. Docket R77-1—The Advent of "Service-Related Costs"	10
5. Docket R80-1—Second Circuit Review	12
SUMMARY OF ARGUMENT	15
ARGUMENT	16
I. A Plain Reading Of Section 3622(b)(3) Requires Maximum Cost-of-Service Allocation	16
II. The Legislative History Of The Act Supports The Conclusion That Section 3622(b) Requires Maximum Cost-of-Service Allocation	19
A. The Udall Bills (H.R. 11750, 17070)	20
B. The McGee/Fong Bills (S. 3612, 3842)	23
III. Neither Economic Theory Nor Legal Precedent Justifies Restricting Cost-of-Service Allocations To Costs Whose Variance With Volume Has Been Precisely Demonstrated	27
IV. The Commission's Utilization Of The Service-Related Costs Concept And Rejection Of Other Approximations Was Arbitrary, Capricious, And Illegally Discriminatory Against First Class Mail	32
CONCLUSION	38
APPENDICES	1a

TABLE OF AUTHORITIES

CASES: Page

Association of American Publishers, Inc. v. *Governors of the United States Postal Service*, 485 F.2d 768 (D.C. Cir. 1973) 6

Baltimore & Ohio R.R. Co. v. *Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87 (1968) 28

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581 (1945) 27

Cudahy Packing Co. v. *Holland*, 315 U.S. 357 (1942) . 26

Davidson v. *Gardner*, 370 F.2d 803 (6th Cir. 1966) ... 26

D.C. Federation of Civic Associations, Inc. v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1970) 26

Howe v. *Smith*, 452 U.S. 473 (1981) 19

National Association of Greeting Card Publishers v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) 8, 9, 10, 12, 13, 14, 15, 18, 28

National Association of Greeting Card Publishers v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 5, 11, 12, 19, 32, 33

Newsweek, Inc. v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981) 1, 15, 19, 27

Northern Pacific Ry. Co. v. *North Dakota*, 236 U.S. 585 (1915) 28

Pennsylvania R.R. v. *International Coal Co.*, 230 U.S. 184 (1913) 27

STATUTES:

5 U.S.C. § 706 3

28 U.S.C. § 1254(1) 1

Postal Reorganization Act of 1970, 39 U.S.C. §§ 101, *et seq.* 2

Section 201 2

Section 202 2

Section 403(c) 37

Table of Authorities Continued

Page

Section 3601 2
Section 3602 2
Section 3621 5
Section 3622(a) 3, 15
Section 3622(b) 3, 5, 8, 9, 18, 25
Section 3622(b)(3) .. 4, 6, 10, 14, 15, 17, 18, 19, 26, 27, 38
Section 3624(a) 3
Section 3624(c) 3
Section 3625 3
Section 3625(b) 13
Section 3625(c) 13
Section 3628 ..... 3, 13
Section 3703(c) 23

OTHER:

116 Cong. Rec. 20222 (1970) 23
116 Cong. Rec. 21521 (1970) 25
116 Cong. Rec. 27606 (1970) 26
H. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970) 23
Conf. Rep. No. 91-1363, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3649 (1970) . 26
H.R. 11750, 91st Cong., 1st Sess. (1969) 21
Senate Journal, 91st Cong., 2d Sess. (1970) 26
S. Rep. No. 91-912, 91st Cong., 2d Sess. (1970) 6
A. Kahn, The Economics of Regulation: Principles and Institutions (1970) 29, 35
Hearings on H.R. 4 and H.R. 11750 Before the Senate Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 22
Hearings on S. 3613 Before the Senate Committee on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 24

Table of Authorities Continued

Page

Proposal to Reform the Postal Service: Hearings on H.R. 4 and H.R. 11750 Before the House Committee on the Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 20, 21, 22, 23

Proposals to Reform the Postal Service: Hearings on H.R. 17070 and Similar Bills Before the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 21

Report of the President's Commission, Towards Postal Excellence (1968) 21

Webster's New Collegiate Dictionary (1979 ed.) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC., *Petitioner,*

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF OF PETITIONER NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

Petitioner National Association of Greeting Card Publishers ("NAGCP") respectfully submits this brief on the merits.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit and the Order denying rehearing are reported at 663 F.2d 1186 (1981).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), which authorizes review by writ of

certiorari of judgments of the United States Courts of Appeals.

STATUTORY PROVISIONS INVOLVED

Appendix C to the petition for writ of certiorari in No. 81-1304 contains the relevant statutory provisions of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.*

STATEMENT OF THE CASE

This case involves the principles and methodology by which postage rates are determined. At issue is the proper interpretation of the ratemaking provisions of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.* For more than ten years those provisions have been a source of controversy which is now reflected in conflicting decisions by the District of Columbia and Second Circuits. We trace below the origins of that controversy and the differing interpretations to be resolved by this Court.

1. The Postal Reorganization Act Of 1970

The statutory framework for the formulation of postage rates is found in the Postal Reorganization Act of 1970 ("Act"). Section 201 of the Act established the United States Postal Service ("USPS") as an independent agency of the executive branch and created a Board of Governors to manage the agency.[1] The Act also established the Postal Rate Commission ("Commission") which functions independently of the USPS.[2] Together, the Governors of

[1] The Board of Governors consists of 11 members, nine of whom are known as Governors and are appointed by the President for nine-year terms. The Governors appoint the Postmaster General and the Deputy Postmaster General, who become voting members of the Board. 39 U.S.C § 202.

[2] The Commission is composed of five Commissioners appointed by the President for six-year terms. 39 U.S.C. §§ 3601, 3602.

the USPS and the Commission are responsible, in accordance with the Act's provisions, for determination of postage rates and classifications.

The rate process begins with the USPS' submission to the Commission of a request for a recommended decision on changes in postal rates and fees. 39 U.S.C. § 3622(a). The Commission holds hearings on the record in which the USPS and interested parties appear and present evidence. *Id.* § 3624(a). Within 10 months of receiving the request, the Commission must issue its recommended decision. *Id.* § 3624(c). The Governors act on that decision in one of several specified manners: approval, allowance under protest, rejection, or modification. *Id.* § 3625. A decision of the Governors to approve, allow under protest, or modify the Commission's recommended rates is appealable to any United States Court of Appeals, which reviews the decision under the standards of 5 U.S.C. § 706 on the basis of the record before the Commission and Governors. *Id.* § 3628.

The criteria by which the Commision is to formulate postal rates are set forth in § 3622(b) of the Act:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) *the requirement that each class of mail or type of mail service bear the direct and indirect*

postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

(Emphasis supplied).

Paragraph (b)(3), emphasized above, has been the starting point for all rate determinations under the Act. That paragraph states "the requirement that each class of mail . . . bear the direct and indirect postal costs attributable to that class . . . plus that portion of all other costs of the Postal Service reasonably assignable to such class." To comply with paragraph (b)(3), it is thus necessary to identify those USPS costs which are caused by each mail class or service, and to allocate those costs, for pricing

purposes, to the respective mail class or service.[3] The remaining costs, not identifiable to a particular class or service, may then be distributed in accordance with the other criteria of § 3622(b).[4]

2. Docket R71-1—The First General Rate Proceeding

The first experience with the Act's ratemaking provisions was Commission Docket R71-1. The USPS proposed to the Commission new rates, including an increase in the first class rate from 6 to 8 cents. In its proposal, the USPS attributed only 49% of the total cost pool to mail classes and services[5] which were found to have caused those costs. The remaining 51% of the USPS' projected costs were then distributed among the classes based largely on an inverse elasticity or demand theory.[6]

The USPS confined its search for causality to an analysis of costs which varied with volume in the short-term. No effort was made to identify costs which varied with volume in the long-term (over one year) or to seek out

---

[3] The four general mail classifications are described in the D.C Circuit's opinion in National Association of Greeting Card Publishers v. United States Postal Service, 607 F.2d 392, 404-05 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) [hereinafter cited as *NAGCP III*].

[4] The Act requires the Postal Service to "break even," that is, to obtain sufficient revenues to equal its costs. 39 U.S.C. § 3621. In theory, therefore, once all costs have been allocated among the various mail classes and services, and the rates set so as to recover those costs, the Postal Service will achieve its revenue requirement.

[5] To avoid repetition, the various mail classes and services will henceforth be referred to simply as the "classes" or "mail classes."

[6] Chief Examiner's Initial Decision, Docket No. R71-1 at 16 [attached as Brief Appendix 1 hereto]. This is a public document of which the Court can take judicial notice. NAGCP has lodged the entire Initial Decision in the Court's records.

other causal relationships. *Association of American Publishers, Inc.* v. *Governors of the United States Postal Service*, 485 F.2d 768, 777-79 (D.C. Cir. 1973).

The USPS proposal met with stiff criticism both in the Commission and in the D.C. Circuit. The Commission's Chief Examiner found in the language of § 3622(b)(3) and the legislative history a mandate that attribution of costs to the classes based on causality be maximized to the extent reasonably possible. *Id.* at 779 & n.17. He concluded:

> Distributing billions of dollars on the basis of thinly supported judgments is not an acceptable method. And it is an invitation to pressures which Congress sought to avoid.

Id. at 778. On review, the D.C. Court of Appeals agreed. In a concurring opinion joined by all three judges, the court referred to the "fundamental problem" as "an unstructured and well-nigh unreviewable discretion in two individuals to propose allocation of over half of the Service's budget." *Id.* at 778. Noting that Congress' intent in passing the Act was to "purge the postal system of 'politics,' " *id.* at 779, the court quoted from the legislative history to show that excessive discretion to allocate costs without regard to cost causality exposed the process to those political pressures. *Id.* at 776-77 (citing S.Rep. No. 91-912, 91st Cong., 2d Sess. 11 (1970)).

Because Docket R71-1 was the USPS' initial effort at formulating rates under the Act, however, neither the Commission nor the court ordered corrective action in accordance with its criticisms. *Association of American Publishers*, 485 F.2d at 779.

3. Docket R74-1—The D.C. Circuit Interprets Section 3622(b)

In the second general rate proceeding, Docket R74-1, the USPS proposal was based on the same methodology used in the previous proceeding. Again relying solely on studies of short-term volume variability, the USPS attributed only 45% of its $12 billion of total costs—a decline in attribution from the 49% level attained in Docket R71-1.[7] The remainder of total costs were distributed inversely to the elasticity of the classes.[8]

The Commission's Administrative Law Judge (formerly "Chief Examiner") Wenner, on the basis of the record hearing, recommended a substantial alteration of the USPS proposed rate structure and the methodology underlying it. While accepting the USPS attributions as far as they went, Wenner made further attributions based on cost accounting principles in cost segments in which the USPS had failed to provide data on volume variability.

His use of distribution keys was most significant in the area of the transportation and carrier cost segments. While the USPS had attributed only 21 percent of the total costs in those segments through variability analysis, Wenner brought that level up to 98 percent using distribution keys of weight and cubic volume. His reasoning was, in part, as follows:[9]

> The cubic volume of mail determines the number and size of the vehicles required which affects the main-

---

[7] Chief Administrative Law Judge's Initial Decision, Docket No. R74-1 at 12. [Portions attached as Appendix 2 hereto] [hereinafter cited as R74-1 Initial Decision]. NAGCP has lodged the entire Initial Decision in the Court's records.

[8] *Id.*

[9] *Id.* at 25 [Brief App. 2 at 5a].

> tenance, fuel and lease costs. The weight of the mail affects the loading and unloading effort and also bears on the needed carrying strength and operational expenses of the vehicle. The cost of drivers varies with vehicle operations.
>
> The cost of the mail carrier's walking (or driving a vehicle) over his route is governed by weight and space. What he can carry in his pouch and his hands is affected by the weight (35 pounds maximum under Postal Regulations) and the size (in cubic volume) of the load; this determines how often he must return to the relay box or to his car. The weight and cubic volume of mail also affects the size of the vehicle he needs (where he has one).

As later described by the D.C. Circuit in *National Association of Greeting Card Publishers* v. *United States Postal Service*:[10]

> Simply put, the alternative approach relies on cost accounting principles to augment the inferences of causation derived through use of the cost variability theory. Additional attribution results from using distribution keys such as weight, volume and number of pieces of mail to apportion among the postal services affected those cost segments which clearly affect more than one service and which, although not measurably variable on presently available data, are reasonably susceptible to such apportionment.

For the remaining or "institutional" costs, Wenner proposed that they be distributed in proportion to the attributed costs, except where specific consideration of the non-cost factors of § 3622(b) required a deviation therefrom. *NAGCP I*, *supra* note 10, at 584. Wenner's additional attributions and revised method of distributing institutional costs resulted in a first class rate of 8.5 cents

---

[10] 569 F.2d 570, 583 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) [hereinafter cited as *NAGCP I*].

rather than the Postal Service's proposed 10 cent rate. R74-1 Initial Decision, *supra* note 7, at 12-13 [Brief App. 2 at 8a].

The Commission did not accept Wenner's recommendations. Though it criticized the USPS' failure to analyze the *long*-term impact of volume changes on costs[11] and increased the level of attribution based on variability to 52.5%, the Commission was unwilling to fill the gap in attribution, left by the insufficient variability data, with other allocation methods; volume variability was held to be the only proper indicator of causation. *NAGCP I*, *supra* note 10, at 581-82. The Commission's approach was summarized on review by the D.C. Circuit as follows:

> The touchstone of the cost variability approach is the Commission's concern that causation be measured as accurately as possible—that within the bounds of available data, all elements of approximation or estimation be excluded.
>
> * * *
>
> The structure of this approach and the unavailability of complete data led in the first two rate proceedings to recommended decisions which, by the Commission's own account, did not attribute to each class all the costs that likely were the result of providing the particular service.

Id. at 581.

The D.C. Circuit held that the Commission's restrictive approach was inconsistent with the language of § 3622(b) and the intent of the Act, both of which commanded cost-of-service allocation to the maximum extent reasonably possible. Beginning its analysis with the

---

[11] R74-1 Opinion and Recommended Decision of the Postal Rate Commission at 132.

statutory language, the court emphasized that paragraph (b)(3) was the only factor designated as a "requirement," and, further, that extremely inclusive language was used in (b)(3) to describe the obligation to trace costs to the responsible class. *Id.* at 585-86. Reviewing the legislative history, the court noted Congress' awareness of past discrimination against first class mail and its desire to end that discrimination by limiting the USPS' discretion to allocate costs on vague and judgmental bases. *Id.* at 586 & n.59, 587. The court therefore directed the Commission to supplement the USPS' variability-based attributions with cost allocations based on other reasonable keys to assure that the rate for each class reflected the full costs fairly attributable to it. The court further directed that the "reasonable assignment" of other costs under paragraph (b)(3) also be on a cost-of-service basis. *Id.* at 586-87.

4. Docket R77-1—The Advent of "Service-Related Costs"

Docket R77-1 was the fourth general rate proceeding under the Act. [12] It was the Commission's first opportunity to apply the precepts of the *NAGCP I* decision.

The USPS proposed two new and related concepts in Docket R77-1 in an apparent attempt to meet *NAGCP I*'s call for causally based allocations in addition to volume variable cost attribution. Those two concepts were "service-related costs" and "citizens' rate mail."

The service-related costs concept was based on differences in service standards among the mail classes. The USPS characterized each class as preferential or nonpre-

[12] The third general rate proceeding, Docket R76-1, in which the first class rate was increased to 13 cents, occurred prior to the D.C. Circuit's *NAGCP I* decision. Judicial review of R76-1 was mooted by that decision and the beginning of Docket R77-1.

ferential. Delivery of preferential mail was required in the first delivery trip after receipt at a distribution facility; delivery of nonpreferential mail was theoretically deferrable. On the basis of testimony by Postal Service witnesses that the nonpreferential standards could be met by a three-day-a-week delivery schedule rather than the prevailing six-day delivery schedule, the USPS estimated the difference in projected delivery costs between a six-day and three-day schedule, and allocated this differential cost to the preferential mail classes as a "reasonable assignment" pursuant to paragraph (b)(3). *NAGCP III*, *supra* note 3, at 406-07.

The USPS also proposed a new subclass of first class mail to be known as "citizens' rate mail." This lower-priced subclass, for use by individuals, was to be nonpreferential and thus subject to deferred delivery. *Id.* at 411 n.72. The availability of the citizens' rate discount would have given the citizen a choice between paying the higher rate, 16 cents, associated with service-related costs or accepting nonpreferential service at a 13-cent rate.

The Commission[13] accepted the concept of service-related costs, but rejected the corollary concept of citizens' rate mail. Thus no choice was presented to mailers who might be willing to have deferred delivery in return for a lower rate. Attribution was again limited to those costs whose variability with volume could be demonstrated from record evidence. By use of long-term in addition to short-term variability studies, the Commission attributed almost 65% of total costs. *Id.* at 405-06. The Commission's decision included an increase in the first class rate from 13 to 15 cents.

---

[13] The hearing in Docket R77-1 was held before the Commissioners; no administrative law judge was used.

On review, the D.C. Circuit upheld the Commission's decision. It noted that the Commission had failed to use allocation methods other than volume variability to attribute costs, as had been ordered in *NAGCP I*. Because no party had challenged the Commission's decision on that point, the court did not pass on it. *Id.* at 406. The court added, however, that the extension of volume variability analysis to long-term costs, plus the "assignment" of service-related costs, might have been "an appropriate application of *NAGCP I*." *NAGCP III*, *supra* note 3, at 406. The court reluctantly accepted the service-related cost concept, noting several apparent deficiencies, *id.* at 408-11, calling for future improvements, and concluding:

> The PRC did provide a discussion of the feasibility of the three-day system. While some of its assumptions are, to put it mildly, optimistic, we cannot say that the system is so unrealistic a model as to call into question the rationality of the conception underlying service-related costs.

Id. at 409-10 (footnote omitted).

5. Docket R80-1—Second Circuit Review

In the rate proceeding at issue, USPS' proposal was highlighted by the exclusive use of volume variability analysis to attribute 59.3% of total postal costs (compared to 65% attribution by the Commission in Docket R77-1), the abandonment of the service-related cost concept, and the distribution of 66.7% of "institutional" costs on a judgmental basis to first class mail. [14]

The Commission's recommended decision again relied solely on volume variability analysis, both short-term and long-term, to "attribute" costs. [2d Cir. J.A., Vol. IV, at

[14] [J.A. at 45a]. Of the costs allocated by the USPS on a cost-of-service basis, 56.7% were found to be caused by first class mail. *Id.*

138-40]. Despite USPS' disavowal of service-related costs, the Commission utilized that concept to assign $1.84 billion of costs, of which 88% or $1.62 billion was charged to first class mail. [J.A. at 294a]. The Commission indicated an intention to commence a new proceeding "in the near future" to consider a deferred first-class rate. [15]

Whereas in the previous rate proceedings, the Governors of the USPS had approved the Commission's recommended decision pursuant to 39 U.S.C. § 3625(b), this time the Governors, on March 10, 1981, acted pursuant to § 3625(c) to allow the Commission's decision to take effect under protest while returning the matter to the Commission for reconsideration and a further recommended decision. Petition for Certiorari No. 81-1304, App. B. This allowance under protest was an appealable action under 39 U.S.C. § 3628. The Governors' dissatisfaction with the Commission's recommendations centered on the Commission's $1 billion reduction in revenue requirement and use of the service-related costs concept. The Governors also expressed their disagreement with the *NAGCP I* decision. *Id.*

The new rates went into effect on March 22, 1981. The cost of a first class letter (one ounce or less) was raised to 18 cents. [16] By comparison, a postcard cost 12 cents to mail; a presorted first class letter cost 14 or 15 cents to mail depending on the level of presortation; a typical five-ounce issue of Newsweek magazine, a second class

---

[15] [2d Cir. J.A., Vol. IV, at 12]. No such proceeding has been started, however.

[16] The USPS had proposed a 20 cent first class rate. The Commission's lower recommended rate resulted from a reduction in the revenue requirement and less onerous distribution of institutional costs to first class mail.

mailing, cost between 9 and 10 cents to mail, depending upon advertising content and assuming zones 1 and 2; and a three-ounce third class circular (often referred to as "junk mail") sent by regular bulk mail cost 6.4 to 10.4 cents to mail, depending on the level of presortation.[17] Petition for Certiorari No. 81-1304, App. B, at 24b, 30b, 44b, 139b.

Several parties petitioned for review of the Governors' March 10, 1981 decision in the Second Circuit and D.C. Circuit. The petitions were consolidated in the Second Circuit, and the case was briefed and argued to a panel of the court.[18] NAGCP argued that the Commission had failed to apply properly *NAGCP I*'s mandate for maximum cost-of-service allocation, and that the Commission's utilization of service-related costs was arbitrary and illegally discriminatory. Certain parties, including Newsweek, Inc., Time, Inc., and the USPS, argued that the D.C. Circuit's interpretation of § 3622(b)(3) in

---

[17] Third class bulk mailers must also pay a $40 annual fee.

[18] Meanwhile, the Commission issued its Recommended Decision Upon Reconsideration on June 4, 1981. The Governors rejected that further recommended decision on June 29, 1981, and again remanded the matter to the Commission. The Commission's Recommended Decision Upon Further Reconsideration, issued September 17, 1981, was "modified" by the Governors on September 30, 1981. The modification resulted, *inter alia*, in the increase in the price of a first class stamp from 18 to 20 cents. The Governors' September 30, 1981 decision has been appealed and decision on that appeal is pending in the Second Circuit (Docket Nos. 81-4183, *et al.*).

Under the rates currently in effect, a five-ounce Newsweek magazine still costs 9 to 10 cents to mail depending upon advertising content and assuming zones 1 and 2; a three-ounce third class advertising circular costs 7.9 to 10.9 cents to mail depending upon the level of presortation; a postcard costs 13 cents to mail; and a presorted first class letter (one ounce or less) costs 16 or 17 cents to mail depending upon level of presort.

NAGCP I was incorrect. In its opinion issued November 2, 1981, the Second Circuit agreed with the latter argument. *Newsweek, Inc.* v. *United States*, 663 F.2d 1186 (2d Cir. 1981).

The language of § 3622 was not to be interpreted, said the court, as requiring maximum cost-of-service allocation; rather, the attribution requirement was intended only to provide a "rate floor" for each class based on short-term variable costs, while the phrase "that portion of all other costs . . . reasonably assignable to such class" was found not to imply the use of cost-of-service principles at all. *Id.* at 1199-200. The court held that while the Commission could maximize attribution, it was not required to do so.

Several parties also argued that the Commission's reliance on a service-related cost concept was arbitrary and capricious. The Second Circuit, however, upheld the concept, stating that it was "not an unreasonable methodology." *Id.*

Because, in NAGCP's view, the Second Circuit's decision improperly interpreted the ratemaking provisions of the Act, and because the Second Circuit's decision directly conflicted with those of the D.C. Circuit, NAGCP petitioned this Court for a writ of certiorari to the Second Circuit. The writ was granted on April 19, 1982.

SUMMARY OF ARGUMENT

The Second Circuit erred in interpreting § 3622(b)(3) to require only a rate floor for each class consisting of short-term volume variable costs rather than the achievement of maximum cost-of-service attribution. The court's interpretation is inconsistent with a plain reading of the statute, which expressly requires, without stated limitation, that each mail class bear the direct and indirect

postal costs for which it is causally responsible. The interpretation also conflicts with the legislative history; Congress rejected language sponsored by the USPS ("demonstrably related costs") which might arguably have permitted the sole use of volume variability analysis (albeit long- as well as short-term variability) to attribute costs. The Second Circuit's misreading of the legislative history resulted from the court's reliance on comments by the House conferees made after the Act had been voted on in the Senate, which comments were belied by the language of the statute and by the fact that the House had yielded to the Senate on the very provision in question.

The use of attribution methods other than volume variability analysis is reasonable, economically appropriate, and normal in ratemaking proceedings. The Commission's unwillingness to attribute costs based on appropriate additional methods has distorted postal ratemaking to the disadvantage of first class mail. This unwillingness, combined with the Commission's refusal to abandon the patently unrealistic and inaccurate service-related costs concept, was arbitrary and unduly discriminatory against first class mail. The Second Circuit's failure to so hold is reversible error.

ARGUMENT

I. A Plain Reading Of Section 3622(b)(3) Requires Maximum Cost-Of-Service Allocation

Section 3622(b)(3) provides:

> (b) Upon receiving a request, the Commission *shall* make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> * * *

> (3) the *requirement* that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type . . . .

(Emphasis supplied). The language in (b)(3) is precise and inclusive; there is no room for avoidance of its mandate that the rate set for each mail class reflect, at a minimum, all of the costs which are caused by that class of service.

First, only section 3622(b)(3), of all the factors, is stated to be a "requirement." Though the other seven factors must be taken into account in setting rates, those factors are subjective and non-quantifiable considerations. By contrast, factor (b)(3) is an objective standard. Its application must precede that of the other factors. Only residual costs can be influenced by the other factors if the "requirement" of (b)(3) is to be met.

Second, the mandate that each class bear the costs "attributable" to that class is unequivocally a reference to cost-of-service pricing. The first definition of the verb "attribute" in *Webster's New Collegiate Dictionary* (1979 ed.), is "to explain by indicating a cause." Thus, the costs attributable to a class are those caused by the class.

Third, the use of the adjectives "direct and indirect" is totally inclusive. There is no third category. By definition, if a postal cost is attributable to a class of mail, but not directly so, then it is indirectly attributable.

Fourth, if the requirement for maximum use of cost-of-service allocations in establishing rates is not otherwise clear, the further requirement for "reasonable assignment" of a portion of the remaining costs to each class confirms the goal of maximum causal allocations.

Despite the seemingly clear message of paragraph (b)(3), much confusion has been sown by the Commission's insistence on attributing only those costs whose causal relationship to a class had been "precisely" calculated through volume variability analysis. [19] Through two proceedings—Dockets R71-1 and R74-1—this artificial limitation on attribution permitted only 50% of postal costs to be causally allocated to the classes, although even the Commission admitted that not all causal relationships had been explored. Administrative Law Judge Wenner's effort to move beyond volume variability analysis to bridge the gap was rebuffed by the Commission. *NAGCP I*, 569 F.2d at 584.

In this context, the D.C. Circuit in *NAGCP I* felt compelled to act. It rejected the USPS' self-imposed restriction on methods of attribution and, in addition, interpreted the "reasonable assignment" language of (b)(3) to imply cost-of-service allocation. The D.C. Circuit's interpretation has been since referred to as the "three-tier" allocation, *i.e.*, first attribution, then reasonable assignment, on a cost-of-service basis, followed thirdly by distribution of the remaining "institutional" costs in accordance with the seven other factors in § 3622(b).

The three-tier allocation has proved difficult to implement, for, if attribution is not artificially restricted to a single method of analysis, then attribution should comprise all possible causal allocations, leaving nothing to "reasonably assign" on a cost-of-service basis. In Docket R77-1 the Commission finessed this problem by continuing to restrict its attribution of costs to those whose causal relationship had been calculated through volume variability analysis, while "reasonably assigning" addi-

[19] The facade of precision which the Commission gives to volume variability analysis is undeserved, as shown below.

tional costs under the so-called service-related costs concept. That approach was accepted by the D.C. Circuit in *NAGCP III*.[20]

It is apparent that whether a "three-tier" or "two-tier" allocation is used, the end result is the same so long as the requirement of maximum cost-of-service allocation is observed. A plain reading of paragraph (b)(3) permits nothing less. The Second Circuit decision below, which interprets paragraph (b)(3) to require only a rate floor consisting of short-term variable costs, *Newsweek, Inc.*, 663 F.2d at 1199-200, is inconsistent with the language of the statute.

This Court has held that when the terms of a statute are unambiguous, the inquiry as to the statute's interpretation comes to an end, except in "rare and exceptional circumstances." *Howe* v. *Smith*, 452 U.S. 473, 483 (1981). The meaning of paragraph (b)(3) is plain: each class must bear *all* costs for which it is causally responsible.

II. The Legislative History Of The Act Supports The Conclusion That Section 3622(b) Requires Maximum Cost-Of-Service Allocation

The legislative history of the Postal Reorganization Act of 1970, insofar as ratemaking principles are concerned, reveals clash between conflicting bills in the House and Senate. The House bill, sponsored by Representative ("Rep.") Udall and the Post Office, would have had each class bear the "demonstrably related" costs of that class. The "demonstrably related" standard left

---

[20] 607 F.2d at 406. In accepting that approach, however, the court pointed out that in that case no party had specifically challenged the Commission's failure to move beyond volume variability in its "attribution" of costs. NAGCP there confined its arguments to support of the proposed citizens' rate mail subclass.

room for a narrowly defined measure of causation. The Senate bill reflected a greater concern that each class pay its own way. In conference, the Senate bill prevailed, and the provision relating to cost-of-service allocations was strengthened even beyond the language originally in the Senate bill.

A. The Udall Bills (H.R. 11750, 17070)

On April 22, 1969, hearings began in the House Committee on Post Office and Civil Service on H.R. 11750, sponsored by Rep. Udall and the Post Office, and H.R. 4, sponsored by Rep. Dulski.[21] H.R. 11750 contained the following language respecting ratemaking:

> § 1201. Rate Policy
>
> * * *
>
> (c) Except as provided in section 1202 and as otherwise provided in this section, the Postal Service shall establish appropriate classes of postal service and establish rates and fees for each such class of postal service *so that at least those costs demonstrably related to the class of service in question will be borne by each such class and not by other classes of users of postal services* or by the mails generally.
>
> (d) Notwithstanding the other provisions of this section, in making changes in the structure of its rates, the Postal Service shall take into account the financial impact upon affected users of the various classes of the mail and, at its discretion, may achieve

---

[21] *Proposals to Reform the Postal Service: Hearings on H.R. 4 and H.R 11750 Before the House Committee on the Post Office and Civil Service*, 91st Cong., 1st Sess. (1969) [hereinafter cited as *1969 House Hearings*].

> the policy goals of this section over a duration of time appropriate in view of such financial impact. [22]

The two salient features of the above ratemaking provision were (1) the conditional mandate that each class bear its "demonstrably related" costs, and (2) the condition placed on that mandate permitting it to be superseded by considerations of the financial impact upon users of the mail.

The condition stated in section 1201(d) was recognized by several Congressmen as allowing a continuation of below-cost rates being charged for second and third class mail. *1969 House Hearings*, *supra* note 21, at 507, 621-22, 813. Indeed, Rep. Udall suggested during the hearings that subsidization of second class mail by first class users would be appropriate. *Id.* at 667-71.

The term "demonstrably related" costs was frequently addressed, but never clearly defined. The term had been previously used in the much-publicized report of the Kappel Commission:

> In economic terms, each class should bear, as a minimum, the long-run variable costs ascribable to it—the full added costs demonstrably related to that class. [23]

In the House hearings, the Post Office submitted a written memorandum in response to criticism of the alleged

---

[22] H.R. 11750, 91 Cong. 1st Sess. 70 (1969) (emphasis supplied). H.R. 4 contained essentially the same provision regarding the cost allocation of demonstrably related costs. *Proposals to Reform the Postal Service: Hearings on H.R. 17070 and Similar Bills Before the House Committee on Post Office and Civil Service*, 91st Cong., 2d Sess. 79 (1970) [hereinafter cited as *1970 House Hearings*]. When the bills were debated in committee, however, H.R. 11750 ordinarily was discussed. This brief, therefore, focuses on H.R. 11750.

[23] *Report of the President's Commission, Towards Postal Excellance*, at 131. The Chairman of the Commission, Frederick Kap-

vagueness of the term, which memorandum stated in part:

> The purpose of coining the new phrase, "demonstrably related costs," was to avoid the confusion that has existed in the past over the meaning of such terms as "marginal" or "incremental" costs. Demonstrably related costs are those costs which can be traced directly to the class of service in question. The language of the bill calls for a hard, factual determination on this point, and not as the memorandum suggests, for an exercise of "unlimited discretion." Again, we believe that the legislative history has made amply clear what the term means, without shackling future generations to any particular economic theory.

Id. at 1273.

Later, in Senate hearings on H.R. 11750, Postmaster General Blount described demonstrably related costs as follows:

> The proper determination of demonstrably related costs will take a considerable amount of work. Basically, however, such costs will include not just the direct operating costs, if you will, of handling a particular class of mail, but will include any cost, whether institutional or otherwise, that is directly traceable to the class of mail in question. [24]

At other times in the hearings, Post Office witnesses compared demonstrably related costs to "incremental" costs. *1969 House Hearings*, *supra* note 21, at 342, 359.

---

pel, testified in the House hearings. *1969 House Hearings*, *supra* note 20, at 279-80.

[24] *Hearings on H.R. 4 and H.R. 11750 Before the Senate Committee on Post Offic and Civil Service*, 91st Cong., 1st Sess. 509 (1969) [hereinafter cited as *1969 Senate Hearings*].

A number of committee members expressed the view that the ratemaking provisions should assure that first class mail did not continue to subsidize other classes of mail. *Id.* at 49, 210, 225, 621-22, 662-64, 852-53, 891. These members may have been reassured by the Post Office's answers; in any event, the original language of section 1201 of the bill was retained in the version passed by the entire House.[25]

B. The McGee/Fong Bill (S. 3613, 3842)

The Senate Committee on Post Office and Civil Service demonstrated an overriding concern about discrimination against first class mail and the need for firm guidelines to obviate that danger. In the 1969 hearings on H.R. 11750, Senator McGee stated in a colloquy with Postmaster General Blount:

> We have to be sure that we are not going to use the first-class area as a cover up or a cover for whatever shortcomings financially that tend, unpredictably, at times to creep into the operations.
>
> That is why our concern will be to make as firm as we can the guidelines on that phase of the ratemaking.[26]

The following year Senators McGee and Fong introduced S. 3613. Section 3703(c) thereof provided that

---

[25] 116 Cong. Rec. 20222 (1970). H.R. 11750 and H.R. 4 merged to become H.R. 17070 in the 1970 session. The House Report on H.R. 17070 states: "Rates are to be set so that each class of service pays at least its own identifiable costs . . . ." H. Rep. No. 91-1104, 91st Cong., 2d Sess. 10 (1970).

[26] *1969 Senate Hearings, supra* note 24, at 514. A similar expression of concern by Sen. McGee is found *id.* at 663.

the Commission's recommendations on rates must "take into account the following factors:" [27]

> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the amount of operating costs, overhead and other institutional costs of the Postal Service properly attributable to each class of mail based on and in proportion to its share of mail volume and its overall effect upon the postal system;
>
> (4) the effect of mail increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;
>
> (6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;
>
> (7) simplicity of structure for the entire schedule, and simple, identifiable relationships between the rates or fees charged with various classes of mail or for postal services; and
>
> (8) such other factors as the Commission deems appropriate.

It is noteworthy that the relevant paragraph (3) above uses the term "attributable," the same term found in the Act. Similarly, the Senate bill contains the listing of fac-

---

[27] *Hearings on S. 3613 Before the Senate Committee on Post Office and Civil Service*, 91st Cong., 2d Sess. 1354-55 (1970) [hereinafter cited as *1970 Senate Hearings*].

tors which, with some differences, became § 3622(b) of the Act.

The language in paragraph (3) was altered somewhat in the revised Senate bill S. 3842 which was ultimately passed by a majority of the Senate. The revised language is as follows:

> (3) operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service. . . .

116 Cong. Rec. 21521 (1970). No hearings were held by the Senate on S. 3842, but in the Senate debate Senator McGee explained that no significant changes from the prior bill were intended except in the area of transportation. *Id.* at 21708.

The Senate Report accompanying S. 3842 stressed that postal rates were henceforth to be "established on the basis of expert consideration of the overall value of the service provided and the allocation of costs on a scientific or quasi-scientific basis" rather than "what the traffic will bear" or "what kind of an increase it got last time" or "its 'social acceptability.' " Senate Report, *supra*, at 11. Further, the new legislation was intended to inhibit the tendency to overcharge first class mail:

> The temptation to resolve the financial problems of the Post Office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing that imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.

Id. at 13.

The House and Senate bills went to conference where the ratemaking language of the Senate bill prevailed. The Conference Report, which contains the text of the Act *but no comment thereon*, was voted on by the Senate in the afternoon of August 3, 1970. *Senate Journal*, 91st Cong., 2d Sess. 719-46 (1970). After the Senate voted, a "Statement of the Managers on the Part of the House" was appended to the Conference Report. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3649, 3712-23 (1970). That Statement purports to explain the provisions of the Act and, with regard to § 3622(b)(3), states that the attribution language "establishes a floor for each class . . . equal to costs . . . that vary over the short term in response to changes in volume . . . or, even though fixed rather than variable, are a consequence of providing the specific service involved." *Id.* at 87. A similar statement was made by Rep. Udall on August 6, 1970, in House debate prior to the House's adoption of the bill that day. 116 Cong. Rec. 27606 (1970). The House Statement and Rep. Udall's subsequent comments are entitled to no weight in the interpretation of § 3622(b)(3). The words are those of only the House conferees, who yielded in conference. In a very similar circumstance, the D.C. Circuit in *D.C. Federation of Civic Associations, Inc.* v. *Volpe*, 434 F.2d 436, 444 n.38 (D.C. Cir. 1970), stated:

> The "Statement of the Managers on the Part of the House" was only appended to the Conference Report . . . . It did not represent the will of the Senate conferees and can only be said to represent the personal opinions of those who signed it.

See, also, Davidson v. *Gardner*, 370 F.2d 803, 828 (6th Cir. 1966). Moreover, this Court has stated that a change of language in conference is strong evidence of an intended change in substance. *Cudahy Packing Co.* v. *Hol-*

land, 315 U.S. 357, 366-67 (1942); *Pennsylvania R.R. v. International Coal Co.*, 230 U.S. 184, 198-99 (1913).

Additionally, the House's *post hoc* interpretation of § 3622(b)(3) is not credible. Throughout the hearings the USPS was unwilling to define "demonstrably related costs" as volume variable costs, much less short-term volume variable costs. Moreover, the Kappel Commission had included long-run variable costs in its definition of demonstrably related costs. Most importantly, the conference rejected demonstrably related costs for a more explicit and inclusive alternative.

The Second Circuit below relied on the after-the-fact House statements to hold that the Commission need only attribute costs which vary with volume in the short-run. *Newsweek*, 663 F.2d at 1199-200. That decision is clearly at variance with the plain meaning of § 3622(b)(3) and the legislative history. The decision is therefore erroneous and must be reversed.

III. Neither Economic Theory Nor Legal Precedent Justifies Restricting Cost-Of-Service Allocations To Costs Whose Variance With Volume Has Been Precisely Demonstrated

The Commission has steadfastly refused to use reasonable inferences of causation in allocating common postal costs. In the Commission's view, unless the proposed allocation is supported by "precise" calculation, it must be disregarded, and all costs consigned to the "fixed" category. [2d Cir. J.A., Vol. V., App. B, at 37]. This insistence on superficial precision has created distortions in the Commission's ratemaking; it is unwarranted by legal precedent or economic theory.

The deceptive "precision" of volume variable costing is illustrated by the USPS' and Commission's treatment of

Cost Segment 4—Clerks, CAG-K Post Offices. In Docket R77-1, the Commission, based on Postal Service data, attributed 91 percent of Segment 4 costs through volume variability analysis. [2d Cir. J.A., Vol. V, App. J. at 59]. In Docket R80-1, the USPS submitted a new study of this cost segment, on the basis of which it was claimed that only 65 percent of these costs could be attributed. [*Id.* at 60]. The Commission so found. [*Id.* at 63]. The USPS also proposed to reduce significantly the level of attribution in Cost Segments 10 (Rural Carriers) and 14 (Purchased Transportation). These new studies were rejected by the Commission. [*Id.* at 137-40, 166, 193-94, 217].

Recurrent changes in methodology, some of which the Commission implements and some it does not, demonstrate that cost attributions are only as "correct" as the particular method in use at the time makes them appear. As this Court has said:

> Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science . . . .

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581, 589 (1945). *Accord, Baltimore & Ohio R.R. Co.* v. *Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 92 (1968).

Cost allocation formulae used to distribute costs where a causal relationship is intuitively obvious or suggested by expert testimony are commonplace in utility regulation. They have been used in the setting of rates for railroads, airlines, and interstate gas lines, all of which involve allocation of common costs.[28] It is economically

---

[28] *See, e.g.*, the numerous administrative and judicial decisions cited in *NAGCP I*, 569 F.2d at 591, and *see Northern Pacific Ry. Co.* v. *North Dakota*, 226 U.S. 585, 596-97 (1915).

proper, in the absence of variability data, to use those formulae to distribute the costs among the classes of mail.[29]

The Commission's refusal to allocate costs on other appropriate bases such as weight and cubic volume creates distortions in rates prejudicial to first class mail. Such distortions are most evident in the transportation and carrier cost segments. While the Commission has attributed the vast majority of costs in the mail processing segments, large accumulations of costs in transportation and carrier services go unattributed.[30] The result is that first class mail, which constitutes 58% of mail pieces[31] and thus accounts for a high percentage of mail processing costs, is fully charged for those costs. Other classes which are heavily presorted have relatively low attribution of processing costs. However, in the transportation and carrier segments, where costs are cubic volume- and weight-related to a significant extent, first class mail is

---

[29] *See, A. Kahn, The Economics of Regulation: Principles and Institutions,* Vol. 1 at 78 (1970); Testimony of Cicchetti, J.A. at 157a-160a and R. 9391-95.

[30] The major mail processing segments—Segments 3 (clerks and mailhandlers, processing only) and 6 (city carriers-in-office)—together comprise $6.47 billion of costs which are 99.8 and 97.1 percent attributed, respectively. The major transportation and carrier segments—Segments 7 (city carriers - street), 8 (vehicle service), 10 (rural carriers), 12 (motor vehicle service), and 14 (purchased transportation)—together comprise $6.67 billion of costs which are 39.9, 16.1, 35.9, and 96.4 percent attributed, respectively. [2d Cir. J.A., Vol. 5, App. J, at 51, 115, 127, 166, 186, 217]. The fact that the Commission is able to attribute 96.4 percent of purchased transportation costs is itself a strong indication that greater attribution in the other transportation and carrier segments is possible.

[31] Testimony of Dalton, Postal Rate Commission R80-1 Record, USPS-8A, at 4. The statistic is for fiscal year 1980.

denied the full benefit of its much lower cubic volume and weight characteristics[32] *vis a vis* the other classes because those costs are treated in large part as institutional.

Expert testimony in Docket R80-1 sponsored by petitioner United Parcel Service ("UPS") supports the intuitive conclusion that the USPS' in-house transportation costs[33] should be causally attributed to the classes in the same proportions as the similar transportation functions purchased from private or common carriers. [*See* 2d Cir. J.A., Vol. II, at 993, 1063-64]. For example, UPS witness Berliner testified:

> Just as vehicle service drivers and purchased highway transportation costs are functionally equivalent and interchangeable, so too are they in fact used interchangeably in practice. Within certain cities, contract transportation supplements vehicle service drivers. Also, inter-city transportation is sometimes performed by Postal Service employees.

[2d Cir. J.A., Vol. II, at 1064.] The Commission, however, would not consider attribution of vehicle services drivers costs in the same proportions as purchased transportation costs because of the absence of variability data. [2d Cir. J.A., Vol. 5, at 125.] Had the Commission been open to this reasonable inference of causation and attributed the transportation costs accordingly, first class mail would have borne approximately 21% of those in-house transportation costs.[34] Instead, those costs are

---

[32] First class mail, for example, constitutes a lower percentage of total mail weight (17%) than second, third, or fourth class mail (22%, 25%, and 20%, respectively). *Id.*

[33] Cost Segments 8 (Vehicle Service Drivers) and 12 (Motor Vehicle Service).

[34] The figure of 21%, representing the attribution of purchased transportation costs to first class mail, is derived from 2d Cir. J.A., Vol. V, App. J at 218, taking the ratio of first class short- and long-term variable costs over total such costs for all mail.

treated as "institutional" and distributed subjectively such that first class mail bears a much higher proportion thereof. [35]

The problem is compounded because, in judging each class' appropriate share of institutional costs, the Commission makes comparisons based upon a percentage-markup of attributed costs. Thus, a class which does not bear its full share of attributable transportation or carrier costs will bear a reduced share of institutional costs. [36]

In R74-1, Chief Administrative Law Judge Wenner dealt with these problems by attributing transportation and carrier costs in accordance with cubic volume and weight. The result was a recommended first class rate of 8.5 cents instead of 10 cents and correspondingly higher rates for other classes, giving the USPS equivalent revenue. NAGCP contends that Judge Wenner's methodology or some reasonable variant thereof is the appropriate response to the Act's requirements. We urge the Court to direct the Commission that increased attribution of transportation and carrier costs in such a manner is essential to compliance with the Act.

In sum, the Commission's reliances on variability analysis and exclusion from consideration of compelling inferences of causation results in rate distortion. Inevitably, first class mail suffers. Nothing in the statute or in principles of regulation requires this perverse result.

---

[35] For example, the Postal Service proposed to allocate 66.7% of institutional costs to first class mail in Docket R80-1. [J.A. at 45a]. While this allocation was reduced by the Commission in setting the 18 cent first class rate, the Governors' subsequent action establishing unilaterally the 20 cent rate effectively reinstates that 66.7% allocation of institutional costs to first class.

[36] *See* 2d Cir. J.A., Vol. V, App. G, Sch. 1; 2d Cir. J.A., Vol IV, at 243-46.

IV. The Commission's Utilization Of The Service-Related Costs Concept And Rejection Of Other Approximations Was Arbitrary, Capricious, And Illegally Discriminatory Against First Class Mail

The Commission's insistence on the appearance of precision has resulted in its utilization of the so-called service-related costs concept, described above in the Statement of the Case. Because that concept is so clearly invalid, and because the Commission has spurned other, more rational approximations in the transportation and carrier segments, the Commission's decision is arbitrary, capricious, and illegally discriminatory against first class mail.

In Docket R80-1 the Commission was faced with a dilemma. The D.C. Circuit's decisions required the Commission to employ inferences of causation in addition to variability analysis in attributing costs. The only such inference used in Docket R77-1 had been service-related costs, but the USPS abandoned that concept in the current docket. On the other hand, inferences of causation suggested by the other parties did not reach the level of precision deemed necessary for use. Thus the Commission resurrected service-related costs.

The service-related costs concept rests on the premises that delivery of certain mail can be deferred and that, were all mail deferrable, mail could be delivered only three days per week rather than six. The "preferential" mail is therefore charged with half of all delivery costs not attributed through variability analysis. Because one-half of unattributed delivery costs is easy to calculate, the Commission has the precision of application upon which it insists. In *NAGCP III*, the court was troubled by evidence that deferrable mail was rarely deferred, that nonpreferential mail was benefiting from preferential service and should share in the cost, and that a three-day

delivery system was infeasible. 607 F.2d at 408-10. Nevertheless, the USPS' testimony was found to be an adequate basis, if barely so, for the Commission's result.

In Docket R80-1, the USPS abandoned service-related costs and hence presented no direct testimony on the subject. The reasons for the USPS' action were explained by the USPS' chief costing witness in response to questions during the hearing. First, he testified that in fact deferrable mail is often not deferred:

> [T]he actual difference in costs which result from the actual act of deferring mail is a very small subpart of the cost estimates which are provided in this proceeding as service-related costs.
>
> * * *
>
> In other words, mail which is deferrable is of a much greater quantity than mail which is actually deferred.
>
> * * *

[J.A. at 29a-31a]. Second, he suggested that preferential mail is not responsible for six-day rather than three-day delivery:

> Recent public attention concerning five-day a week delivery suggests that the issue of the number of days per week required to deliver mail to preferential standards is open. If preferential standards can be met substantially with five-day a week delivery, the magnitude of service-related costs is much smaller—many hundreds of millions of dollars smaller—than calculated by the very rough approach used in Docket No. R77-1.
>
> Additionally, the fact that a substantial portion of preferential mail might be delivered to standards with a four-day a week network, indicating that the amount of service-related costs is even smaller than

> that associated with five-day a week delivery, appear to require consideration.

[J.A. at 38a].

The essence of the above testimony is that service-related costs are *not* causally related to the mail service. The same point was made by the Governors in their decision accepting the Commission's recommendations under protest:

> "Service-related costs" were used for the first time in the last rate case, Docket No. R77-1, in what then appeared to be a reasonable attempt to conform to the Court of Appeals' strongly expressed emphasis in *NAGCP I* on assignment and attribution of costs. Whatever the justification at that time, *substantial increases in mail volumes since then call into question the hypothetical assumptions on which the theory was based.*
>
> * * *
>
> *No one who is informed on postal matters can seriously suppose that the Postal Service would make regular deliveries only three days a week if a few paragraphs concerning priorities were cut out of some internal operating instructions.* Yet, without precisely this supposition, the whole "service-related cost" methodology is meaningless. Reasoned decisionmaking cannot tolerate the assignment of over $1.8 billion on the basis of such a transparent fiction.

Petition for Certiorari No. 81-1304, at 13b (emphasis supplied).

The Commission's position was that, so long as mail was deferrable, the validity of service-related costs did not depend upon whether mail was actually deferred. The Commission did concede that implicit in service-related costs was the assumption that the USPS would deliver

mail three days per week in the absence of preferential standards. [2d Cir. J.A., Vol. IV, at 148]. In R80-1 the evidence, as indicated above, was that mail was not deferred and that service standards were not the cause of six-day rather than three-day delivery. There was no contrary evidence. On this basis Professor C. J. Cicchetti, former Chairman of the Public Service Commission of Wisconsin, testified:

> There is no economic logic nor common sense reason to support the allocation of costs if cost variations are not present because a hypothetical, rather than real work, policy option can be conveniently estimated. Accordingly, it is inappropriate to allocate costs on the basis of the difference between 3-day versus 6-day delivery.
>
> To use it as a proxy for another characteristic, namely handling deferrability, is, to put it mildly, stretching matters. The evidence offered by several parties at the time indicated that there was a wide gap between the nominal deferral of mail handling and actual deferral. In other words the supposed cost causing act of mail handling deferral may not in fact be occurring. Using a proxy that represents more than 7 percent of total system costs (3-day versus 6-day delivery schedules) for a non-observed mail handling procedure is inane.[37]

The utilization of service-related costs was also arbitrary because the Commission did not provide for a deferred first class rate (like the "citizens' rate" proposed in R77-1)

---

[37] [J.A. at 164a-165a]. *See, also A. Kahn, The Economics of Regulation: Principles and Institutions*, 85 (emphasis supplied):

> Service A bears a causal responsibility for a share of common costs *only if there is an economically realistic alternative* use of the capacity to provide it, or if production of A requires the building of additional capacity.

so that individuals could choose between preferential and nonpreferential service. Professor Cicchetti testified:

> An efficiently operated, cost conscious enterprise should give customers opportunities to shift use patterns and service requirements, if these can be adjusted by the customer, to permit both the enterprise and the customer to save money and avoid what are unnecessary costs for unwanted or not required service. This principle is the essence of cost causality or economic pricing.
>
> To charge more of customers, who are granted a non-deferred service, without offering those same customers a deferred service option is economically inefficient even in those instances in which non-deferral were actually to add to costs. Rejecting [a deferred first class mail option] and adding service costs to first class mail is illogical and economically inefficient.

[J.A. at 166a].

The Commission allocates $1.84 billion of costs as service-related. Of that total $1.62 billion or 88% falls on first class mail. By contrast, first class mail's share of total costs attributed through variability analysis is 55%.[38] As an illustration of the enormous impact of service-related costs on first class mail, it might be noted that if only 55% of the $1.84 billion in service-related costs fell on first class mail, the reduction in costs allocated to first class mail, other things being equal, would permit a decrease in the first class rate of approximately one cent (from 18 to 17 cents).[39]

---

[38] The percentage figures are calculated from the data shown at J.A. at 294a.

[39] If the 55 percent figure were applicable, the first class cost share would be $1.01 billion rather than $1.62 billion, or a $.6 billion difference. The Commission concluded that at the 18 cent rate, revenues

To allocate such a huge amount of costs to first class based on a hypothetical model which vastly overstates any costs resulting from preferential service standards is arbitrary, capricious, and unreasonably discriminatory. Instead of balancing the scales by giving effect to first class mail's low cubic volume and weight characteristics, service-related costs aggravate the inbalance still further. In an effort to partially offset this burdening of first class mail, the Commission was forced to allocate a lower share of institutional costs to first class than it deemed "optimal." [2d Cir. J.A., Vol. IV, at 245-47]. Despite this fact the Commission's increase in the first class letter rate was 20 percent, substantially higher than the increases for second class regular rate, third class regular rate, and fourth class parcel post rates of 9%, 9%, and 13%, respectively. [2d Cir. J.A., Vol. IV, at 9]. The trend can only get worse. The Commission proposes to expand the use of the service-related cost concept into the transportation and mail processing areas. [2d Cir. J.A., Vol. IV, at 155-56].

With service-related costs, the Commission has transgressed the bounds of discretion. Its decision violates the intent of Congress which was to assure that the history of discrimination against first class mail would cease, and it violated 39 U.S.C. § 403(c) which prohibits undue discrimination among mail users. There can be little hope for an equitable rate structure in the future unless this Court orders the demise of service-related costs.

---

from first class letters of $11.78 billion would cover costs of those letters. [2d. Cir. J.A., Vol. V, App. G, Sch. 1]. This is equivalent to about $.65 billion in revenues per cent of postage.

CONCLUSION

Section 3622(b)(3) requires that all costs which can be traced to a class of mail causally responsible therefor be borne by that class. There is no provision in that statute for limiting the tracing process to a single methodology, if further causal relationships can be identified and reasonably approximated. At the same time, the approximation chosen cannot, like service-related costs, be so unrealistic and inaccurate as to distort causal relationships.

For these reasons NAGCP requests that the following relief be granted:

1) That the Second Circuit's decision below be reversed insofar as it improperly interpreted the statutory requirements for the formulation of postal rates;

2) That the Second Circuit's decision be reversed insofar as it failed to find that the Commission's utilization of service-related costs was arbitrary, capricious, and unduly discriminatory against first class mail;

3) That the Second Circuit's decision be reversed insofar as it failed to find that the Commission did not utilize all reasonable methods of cost attribution as required by § 3622(b)(3) of the Act; and

4) That the Second Circuit be directed to remand these matters to the Governors with instructions that the

Governors seek a new recommended decision from the Commission in consonance with this Court's holding.

Respectfully submitted,

MATTHEW S. PERLMAN
Counsel of Record
RICHARD J. WEBBER
CORALYN G. MANN
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6279

Counsel for the National Association of Greeting Card Publishers

APPENDIX 1

Chief Examiner's Initial Decision
Docket No. R71-1
(Page 16)

or subcomponents are analyzed to see if any of them meet the test. Those that do are classified as variable; those that don't are classified as institutional. But the breakdown stops with the subcomponent. Even if the subcomponent is 80 percent variable, the whole subcomponent is considered a fixed cost because a subcomponent is not regarded as divisible.

Thus, under Postal Service's definition variable costs cover costs that vary with volume over the short run. All the remaining costs are considered institutional costs. These include fixed costs, long-run variable costs, and short-run costs that do not vary proportionately with volume.

B. Application of Attributable Cost Definition

This is how Postal Service determined whether a cost should be classified as fixed or variable. The Director of the Cost System Task Force was assigned the job of producing estimates of Postal Service's attributable or variable costs. [1] He consulted persons in Postal Service who were experienced in particular cost areas. The decision on how to classify a cost segment was based on the judgment of these consultants in the light of the prepared definitions.

---

[1] A different name was applied at that time to this concept.

APPENDIX 2

Chief Administrative Law Judge's Initial Decision
Docket No. R74-1
(Pages 12-28)

Postal Service generally furnishes its own transportation over its regular local routes. These local route costs fall into two categories: The first consists of costs for vehicle service drivers, motor vehicle services, and the depreciation costs on purchased vehicles. These segments cover the cost of transporting mail between two post offices, between a depot and a post office, on a special airmail run to an airport, etc.; the expenses for these inter-office routes amount to $292 million. The second category of local transportation is the cost of the postman's walking or driving over his patron delivery route in the city and in rural areas; the costs of these subsegments total $1.558 billion. Postal Service treats both categories of local transportation—vehicle operations and patron delivery routes—as fixed costs. The reason it gives is that it practically always has excess capacity. The implication of this claim is that its load factor will increase and its unit costs decrease as its volume increases. There is no statistical evidence to support such results; and the claim is contrary to the assertions of Postal Service's chief rate witness that it maintains a constant load factor because of its ability to make continual adjustments in its capacity to volume changes. [1] The subject is discussed in greater detail in Part III below under "Decreasing Costs."

---

[1] "Since the Postal Service planning process results in continual adjustments to capacity, overall the intensity of capacity utilization tends to be stable from year to year" (9/1599), and again, "Postal fixed capacity does not have the relative cost importance which characterizes capacity of capital-intensive utilities. Further, a large part of the physical capacity in the Postal Service can be added in small units which are inexpensive (e.g., mailsters, sorting cases, delivery trucks, hampers, scales) relative to the cost of labor. Because of these factors, new capacity can usually be added quickly by the Postal Service when shortages are evident. An electric utility, in contrast, would not add a new generator until capacity shortage had become severe enough (and incremental costs has also risen sharply) to justify a huge capital outlay." (9/1660). And Postal Service witness Eden says short-run costs tend to be stable "because they are based on the assumption of constant intensity of capacity utilization." (2/218).

Several witnesses also argue that local transportation costs are fixed: their thesis is in the main that these costs are caused by the need to carry some other class—usually first-class—and that the volumes of mail from any one class won't cause these costs to be incurred—the postman would have to make his rounds anyway. The reality is that Postal Service serves all classes of mail and is operated to fulfill all its obligations. Its local transportation expenses, both inter-office and over patron delivery routes, are incurred to transport all the classes of mail; and each of the classes carried is a substantial contributing factor causing the transportation expense. Witness Hahn, a longtime postal employee appearing for the Parcel Post Association and the Mail Order Association of America, illustrates how the commonality of Postal Service's obligations governs its operations:

> I would say if there was only first class mail that generally we wouldn't motorize routes. The advantage of motorizing routes is two-fold. One is that it puts the delivery of parcels in conjunction with the delivery of all the other mail and thereby eliminates the need to have a parcel post carrier traverse the same general area. The second is it eliminates the need for relay service and putting all of this together, why, it is very economical to motorize routes now; but if there were only first class mail you wouldn't have but one trip in the area and there would be no parcel post in the area and the weight of the mail would be such that it would probably be more economical to relay the mail than it would be to motorize the route itself. 36/7086-87.

The relevant question is: How should these costs which are incurred to transport all classes of mail be apportioned to the classes?

The Civil Aeronautics Board has encountered a similar problem in attributing the capacity cost (essentially the transportation cost) of aircraft to classes—first class, coach, cargo, etc. The cost of flying an airplane between two points does not vary greatly with the load; given an existing flight and schedule pattern it may be considered a fixed cost for practical purposes, though flight patterns may have to be adjusted to meet

expected changes in loads. In *Domestic Service Mail Rate Investigation*, 47 C.A.B. 310 (1967), the issue was how to apportion this capacity cost among classes of traffic. The Board found that a weight-space method best reflected "the cost causative factors" 47 C.A.B. 312-14, 339. [2] The analogy is helpful. The cost of the vehicle services used to carry mail over its inter-office routes is affected by the cubic volume and the weight of the mail. The cubic volume of mail determines the number and size of the vehicles required which affects the maintenance, fuel and lease cost. The weight of the mail affects the loading and unloading effort and also bears on the needed carrying strength and operational expenses of the vehicle. The cost of drivers varies with vehicle operations.

The cost of the mail carrier's walking (or driving a vehicle) over his route is governed by weight and space. What he can carry in his pouch and his hands is affected by the weight (35 pounds maximum under Postal Regulations) and the size (in cubic volume) of the load; this determines how often he must return to the relay box or to his car. The weight and cubic volume of mail also affects the size of the vehicle he needs (where he has one). [3] The number of pieces of mail is of little account in connection with transporting the mail (though it is important for the actual delivery function—a separate cost factor—handing the mail to the patron or putting it in the patron's box).

Postal Service's local transportation costs—inter-office and patron delivery routes—are similar to the capacity costs of the airplane. As the Civil Aeronautics Board opinion noted, "limitations of both space and weight in the capacity of aircraft are constrictive influences in the production of air transportation and are cost causative factors in that sense." 47 C.A.B. at 339. Weight and space are also "constrictive influences" in the

---

[2] In that proceeding the Post Office advocated the use of a space basis for allocating capacity costs. 47 C.A.B. at 340.

[3] Appendix M shows the importance of size of pieces of mail.

production of local postal transportation and are likewise "cost causative factors." Both measures are significant; neither obviously predominates. In these circumstances, it seems appropriate to apply each factor in equal proportions. *Cf. Atlantic Seaboard Corp.*, 11 F.P.C. 43, 56 (1952).

As has been noted, each of the classes of mail is a material factor causing the incurrence of these local transportation costs. The problem is reasonably to apportion the cost consequences of these concurrent causes. The weight-space factor adopted here is a measure that reasonably relates the relative contributions of the various classes to the incurrence of these costs. It is the kind of solution that courts and agencies have traditionally developed to meet the practical needs that arise in resolving legal problems of this type. It is a more reasonable way of apportioning these costs than Postal Service's attempt to distribute them to classes of mail on the basis of the classes' relative elacticities of demand, which has nothing to do with the cost of handling these products. Doubtless more refined methods and judgments will be developed in future cases as more facts are discovered; but a space and weight allocation for transportation is a sound and workable solution to the problem at this stage of postal rate regulation. [4]

As a result of these modifications, $2.565 billion of the total of $2.621 billion in transportation costs is attributed to classes of mail. A comparison of the transportation costs attributed by Postal Service and the method adopted here is shown in the table below.

---

[4] *Cf. Domestic Service Mail Rate Investigation*, 47 C.A.B. at 317. "Although we have reached what we believe to be a fair result on the present record, this is not to say that we would not in future cases be able to devise some more refined costing techniques that might be deemed preferable."

TABLE 1

OVERALL TRANSPORTATION
(millions)

	Total	Postal Service Attributed	CALJ[4] Attributed
Non-Purchased Transportation			
Vehicle Service Drivers	$ 83	$ —	83
Motor Vehicle Service	168	8[1]	168
Motor Vehicle Depreciation	41	2[1]	41
Carrier Street Time[2]			
City Carriers	1,323	—	1,323
Heavy Duty-Rural	54	—	54
Regular-Rural	88[3]	—	88
Equip. Maint. Allowance	93	—	93
Special Delivery Messengers	70	70	70
Total Non-Purchased Transp.	$1,920	$ 80	$1,920
Purchased Transportation	701	465	645
Total Overall Transportation	$2,621	$545	$2,565

[1] Postal Service attributes vehicles used for Special Delivery Service.
[2] Excludes cost of the actual transfer of mail to patron.
[3] Estimated at same proportion that exists on Heavy Duty Rural Routes.
[4] This refers to the cost attributions of the Chief Administrative Law Judge.

* * * * *

We discuss next the details of the specific transportation segments as they are listed in Postal Service's accounts.

Postal Service's method of determining rates was weighed and found wanting in R71-1. If progress is to be made here, it is imperative that we not be diverted into relitigating what was rejected in R71-1.

* * * * *

In its presentation in this proceeding Postal Service used the same methodology as in the first case with the result that it attributed to the classes of mail 45 percent of $12 billion of total costs, instead of 49 percent of total costs as it had done in the first case. And it distributed the more than $6 billion of remaining "fixed" costs on essentially the same estimates of inelasticity of demand for the various classes of mail, as it had done in the first case. When costs are more carefully attributed to the classes of mail we find that these rates set by Postal Service are below costs of service in many classes, causing an unauthorized subsidy of more than $700 million to those classes. This subsidy is paid principally by first-class mailers. Even after first-class letters cover all their attributable cost plus a proportionate share of Postal Service's residual costs, the rate for a first-class letter would be only 8.045 cents instead of the 10 cents now charged by Postal Service.

We establish a rate of 8-1/2 cents for first-class letters, which includes proper attributable costs plus a markup of $1.3 billion over these attributable costs. This rate provides an excess of $259 million in markup which we use to reduce the markup of other classes whose attributable costs have been required to be raised substantially to meet the requirements of the law. Postal Service's charge of 10 cents for a first-class letter provides $1.3 billion in excess revenue which is used to subsidize other classes. The Postal Service has become a tax-collecting agency, collecting money from first-class mailers to distribute to other favored classes. Every time a person pays 10 cents to mail a first-class letter he is paying his appropriate attributable cost plus his proportionate share of residual cost, and in addition, he is contributing almost 2 cents to pay the costs of other services.

Postal Service's presentation in this proceeding makes it clear that the first and primary task of the Postal Rate Commission is to remedy the Service's deficient determination and attribution of costs: to attribute directly to classes of mail insofar as possible so-called "fixed" costs which should properly be charged on a cost basis to these classes of mail; and, "to

take a hard look at both the manner in which Postal Service assigns unattributable costs and the amount of costs that it designates 'unattributable'." *Publishers* at 779.

The task is no longer to criticize and exhort; it is to do the job—now.

II.
ATTRIBUTABLE COSTS

We begin with the statute. Section 3622(b) of the Act establishes the ratemaking standards which the Commission is directed to consider in evaluating increases proposed for postal rates. Paragraph (3) sets forth the specific costing standard:

> the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

The paragraph indicates that each class of mail is to bear all the costs that can be traced to that class; the plenitude of phrasing about costs—attributable, direct, indirect, reasonably assignable—suggests the emphasis placed on determining the full costs of each class and using these as the base for establishing rates. In R71-1 the Commission explained this paragraph:

> But the Act says only that each mail category must bear the costs "attributable" to it [§ 3622(b)(3)]. Nowhere does the Act define "attributable" costs or explain how they are to be derived. If Congress shared the Service's costing theories, it certainly refrained from writing them in the statute. (Recommended Decision, 1-276)

The Commission further endorsed the view that the Act "confers on the Commission discretion to construe attributable costs on the basis of. . . [the Commission's] view of what sound economic and accounting policies require in the light of the circumstances. . . ." 1-276.

The Court decision in *Publishers* refers to paragraph (3) as the "most concrete" of the section 3622(b) guidelines for

determining rates. In substance it endorsed the view that the attribution of costs should be "carried out as far as it reasonably could be" and that other assignments should apply only "where Postal Service simply could not 'attribute' costs."[5]

The Initial Decision in R71-1 raised—without deciding—the question whether under paragraph (3) there was a specific category of "reasonably assignable" costs, or whether this phrase was the operative clause through which a distribution of costs on a pricing basis should be made. We find it unnecessary to decide this matter in this proceeding. Future proceedings, when more data are available, may warrant focusing on this refinement.

The essential problem in Part II is to determine "the direct and indirect postal costs attributable" to the classes of mail as the cost basis for determining rates. After that in Part III we shall translate these attributable costs into rates by determining the appropriate markup for each class on the basis of the pricing factors in the Act.

In R71-1, although the Commission expressed its dissatisfaction with the costing methodology of the Postal Service and with the results, it was constrained to accept Postal Service's attributable costs because no party had presented alternative costs and because the record did not provide a reliable basis for doing so. In this proceeding, in addition to Postal Service's presentation, United Parcel Service, the National Association of Greeting Card Publishers, and the Officer of the Commission submitted evidence regarding the determination of total attributable costs of all the classes of mail. In the remainder of this Part we will determine the attributable costs of classes of mail, using some of the methods and ideas that

---

[5] *Publishers* at 779. The Court in its footnote 17 correctly quotes the Initial Decision that "assignment of costs was to be carried out as far as it reasonably could be." The word "assignment" was there used as a general term without distinguishing between technical terms such as attributable and discretionary or reasonably assignable costs as the Court does in the text of the opinion.

were developed at the hearing, and modifying different methods where this seems appropriate.

The costing methodology which has been used here of allocating common costs is a standard method with regulatory agencies and has been repeatedly adopted and sustained by the courts. *E.g., Domestic Passenger Fare Investigation, Phase 9-Fare Structure*, Order No. 74-3-82, Docket No. 21866-9, see, *e.g.*, p. 32 (March 18, 1974); *Area Rate Proceeding*, AR61-1, 34 F.P.C. 159, 192 *et seq.*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *Colorado Interstate* v. *Federal Power Commission*, 324 U.S. 581, 590 (1945).

Before turning to the attribution of costs, it will be useful to mention several features of Postal Service costs and data:

1. The Postal Service accounting system. The Postal Service accounting system is based on classification into crafts and operations, such as clerks and mailhandlers, vehicles, vehicle drivers, mail carriers, building occupancy costs, maintenance service, transportation, etc. Costs for these groups of crafts and operations are called cost segments and the segments are accumulated as totals for the system; in general, they are not collected on the basis of the work performed for each class of mail. It is necessary, therefore, to break these costs out from the accounting segments in order to attribute them to the various classes of mail. There are 20 major accounting segments with some 87 subsegments based on these various crafts, operations, and divisions, and the cost analysis will perforce have to follow these accounting segments.

2. Common costs. Most Postal Service crafts and operations serve more than one class: the same buildings house all classes of mail; the same trucks carry many classes of mail; the same mailmen deliver all classes of mail; the same conveyer belts lift several classes of mail. This situation, in which common facilities serve many classes, arises frequently in utility regulation where common costs, such as generating plants, pipelines and labor, serve many classes of customers. In these cases commissions have generally adopted the practice of

apportioning the costs of the common facilities on a cost basis in such a way that each user bears a fair and reasonable share of the cost of providing and maintaining the common facility. *In the Matter of Mississippi River Fuel Corp.*, 4 F.P.C. 340, 353 (1945). The courts have repeatedly sustained such results. *Colorado Interstate* v. *Federal Power Commission*, *supra*; *Pan American Mail-Rate Case, Reopened*, 35 C.A.B. 540, 547 (1962).

Thus the Civil Aeronautics Board apportions maintenance expense for ground equipment on the basis of aircraft departures; aircraft servicing costs on the basis of flying time; after various passenger costs have been accumulated they are allocated between first-class and coach service on a relative space basis. See, *e.g.*, *Domestic Passenger Fare Investigation-Phase 9-Fare Structure*, *supra*, at p. 32.

3. Test year. The first step in determining rates is to select a test year and then determine costs for each class for that period. Adjustments are made for probable changes and a rate structure is determined for each class. In this proceeding the test period is the fiscal year July 1, 1974 through June 30, 1975 (FY 1975).

4. Data year. Practically all the data supplied by the Postal Service in this case came from the year 1973. Consequently, estimates for FY 1975 are projected. The Postal Service data are based upon its projections, which are adopted in many cases; however, in other instances where different data are used, projections are made using various methods.

5. Sampling system. In order to determine the costs of various operations, Postal Service set up a sampling system called the "In-Office Cost System;" on the basis of samples, Postal Service determines the time spent on various operations performed in processing classes of mail. This system was a large-scale system, which minimized the possibility of sampling errors, errors which arise in evaluations based upon too small a sampling system; but audits indicted that it was subject to non-sampling error, errors in recording the sample by the

tally taker. So a subsystem was set up. In this system the number of sample tallies was much less than in the main system, increasing the possibility of sampling error; but the tallies were recorded by specialized persons, which reduced the nonsampling error. (This sampling error and the introduction of the audit system were involved in the appeal in *Publishers*.) In this proceeding Postal Service based its estimates on the subsystem, believing that its overall accuracy is greater. The parties have generally adopted this system for their own purposes.[6] Postal Service is presently phasing out the main system.

A. Attributable Costs: Determination And Attribution To Classes Of Mail

In this section we shall determine the total amount of attributable costs and the amounts to be attributed to various classes of mail. Because of the technical nature of certain subjects, we omit certain analyses, placing them in an appendix (Appendix A).[7] In addition, volume two, which is made a part hereof, includes a complete set of worksheets furnishing data and explaining the details of the methods used.

In general, cost data were available only for the year FY 1973 (Fiscal Year 1973, July 1, 1972-June 30, 1973). Postal Service projected its estimates to FY 1975 based on FY 1973 data.

B. Overview Of Transportation Costs

It will clarify matters if we first take an overview of transportation costs generally, because this item cuts across many of Postal Service's accounting segments. Postal Service's transportation costs amount to $2.621 billion. They consist of

---

[6] The Association of American Publishers and the Mail Advertising Association of America have raised problems in this connection which will be discussed below.

[7] All appendices attached hereto are part of this Initial Decision.

two categories: transportation which it purchases from commercial carriers, and transportation which it furnishes itself (non-purchased transportation). The non-purchased transportation consists of costs for servicing, maintenance and depreciation of vehicles, and costs for drivers. It also includes mail carrier costs for carrying mail to the patron's receiving point and for collecting mail. Of the $2.621 billion total transportation cost, Postal Service attributes only $545 million to classes of mail. It categorizes the remaining $2.1 billion as "fixed" costs, distributing this amount to classes of mail not on a cost basis, but on the basis of a markup on the other attributable costs of the class, primarily in accordance with the Inverse Elasticity Rule.

With regard to purchased transportation, Postal Service attributes its cost to classes of mail generally on these bases: rail—cubic-foot miles; water and air transport—weight-distance factors.[8] These items amount to $365 million. The largest item of purchased transportation is for contract highway and trucking service, amounting to $282 million, the bulk of which is for hauling specific classes of mail. Postal Service attributes 40 percent of these costs to the specific classes carried and treats 60 percent as a fixed cost. The reason for treating such a large portion as fixed appears to be that the contracts for these servies, which are for three or four years, generally provide excess capacity. Where Postal Service has the knowledge to relate contracts to specific classes of mail, assigning 40 percent of the costs to them, it is reasonable to attribute the remaining 60 percent to these classes. This we have done.

---

[8] Except air taxi costs and pending airline rate increases which are classified as fixed costs.

Petitioner's Brief

2

Office - Supreme Court, U.S.
FILED
JUL 8 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

October Term, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PETITIONER UNITED PARCEL SERVICE OF AMERICA, INC.

BERNARD G. SEGAL
Counsel of Record
ROBERT L. KENDALL, JR.
JOHN E. MCKEEVER
Attorneys for Petitioner

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
(215) 988-2000
Of Counsel.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Second Circuit err when it interpreted the ratemaking provision of the Postal Reorganization Act that imposes "the requirement that each class of mail . . . bear the direct and indirect postal costs attributable to that class" to mean that the rates for each class of mail need cover only those costs that vary with the volume of the class over the short term, rather than, as different panels of the Court of Appeals for the District of Columbia Circuit have consistently held, that the rates for each class must cover all costs that are caused by providing service to the class?

2. Did the Court of Appeals for the Second Circuit err when it interpreted the ratemaking provision of the Postal Reorganization Act that imposes "the requirement that each class of mail . . . [also] bear . . . that portion of all other costs of the Postal Service reasonably assignable to such class" to mean that all unattributed costs are to be assigned according to eight other factors in the Act, rather than, as different panels of the Court of Appeals for the District of Columbia Circuit have consistently held, that some portion of the unattributed costs must be assigned on reasonable costing bases?

LIST OF PARTIES IN THE COURT BELOW

The following were parties in the court below:

American Business Press, Inc.
American Cancer Society
American Lung Association
Association of American Publishers, Inc.
Classroom Publishers Association
Council of Public Utility Mailers
Direct Mail/Marketing Association, Inc.
Dow Jones & Company, Inc.
International Labor Press Association, AFL-CIO/CLC
Magazine Publishers Association, Inc.
Mail Order Association of America
March of Dimes Birth Defects Foundation
National Association of Greeting Card Publishers
National Easter Seal Society
National Wildlife Federation
Newsweek, Inc.
Parcel Shippers Association
Reader's Digest Association, Inc.
Recording Industry Association of America, Inc.
St. Jude Children's Research Hospital
Time Incorporated
United Parcel Service of America, Inc.
United States Postal Service
Warshawsky & Company

Other than wholly-owned subsidiaries and its Canadian subsidiaries, petitioner United Parcel Service of America, Inc. has no affiliates or subsidiaries. The stock of [illegible]vice Plants Corporation, a related company, is held in trust for the benefit of the shareowners of United Parcel Service of America, Inc. In accordance with Canadian law, qualifying shares of stock in petitioner's otherwise wholly-owned Canadian subsidiaries are held by Canadian citizens. Petitioner and its operating motor carrier subsidiaries are collectively referred to herein as United Parcel Service.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS OF THE COURT AND ADMINISTRATIVE AGENCIES BELOW	1
STATEMENT OF JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
A. History of the Case	4
B. History of Postal Ratemaking	6
SUMMARY OF ARGUMENT	13
ARGUMENT	15
I. The Holding of the Second Circuit Represents an Aberration That Would Undo More Than a Decade of Progress in Postal Ratemaking	15
II. The Holding of the Second Circuit Is Contrary to the Purpose, the Language, and the Legislative History of the Act	18
A. A Primary Goal of the Act Is to End the Historic Discrimination Against Captive First Class Mail Users and the Resulting Subsidization of Users of Other Classes of Mail Competitive With Private Enterprise	19
B. The Act Does Not Limit Attributable Costs to Short-Run Variable Costs, But Instead Provides That All Costs Incurred to Provide Service to a Class of Mail Must Be Attributed to the Class	21
1. The Plain Language of the Act Requires the Commission to Attribute to Each Class of Mail All Costs, Direct and Indirect, Incurred in Providing Service to the Class	21

TABLE OF CONTENTS (Continued)

Page

2. The Legislative History of the Act Supports the Plain Reading of the Statutory Language That All Costs Caused by a Class of Mail, Not Just the Short-Run Variable Costs of the Class, Must Be Attributed to the Class 25

3. The Second Circuit Based Its Limitation of Attributable Costs to Short-Run Variable Costs on a Mistaken Understanding of the Act's Legislative History 33

C. The Act Requires That Some Portion of Unattributed Costs Be Reasonably Assigned on a Costing Basis Before the More Discretionary Factors of the Act Are Applied 36

III. Congress Has Endorsed the District of Columbia Circuit's Interpretation of the Act 38

IV. The Holding of the Second Circuit Is Contrary to Principles of Sound Public Policy Embodied in the Act 39

A. Proper Costing Is Essential to Prevent Cross-Subsidization and Undue Discrimination Among the Classes of Mail 39

B. Short-Run Costing Would Permit the Cost Burden of One Class of Mail to Be Shifted Unfairly to Another Class 42

C. The Costing Standard Adopted by the Second Circuit Would Permit the Postal Service to Compete Unfairly Against UPS and Other Private Enterprise Firms 44

CONCLUSION 47

TABLE OF AUTHORITIES

Cases: Page

American Smelting & Refining Co. v. Occupational Safety & Health Review Commission, 501 F. 2d 504 (8th Cir. 1974) 35

Association of American Publishers, Inc. v. Governors of the United States Postal Service, 485 F. 2d 768 (D. C. Cir. 1973) 7, 38

Blau v. Lehman, 368 U. S. 403 (1962) 39

Consumer Product Safety Commission v. GTE Sylvania, 447 U. S. 102 (1980) 35

Continental Air Lines, Inc. v. CAB, 551 F. 2d 1293 (D. C. Cir. 1977) 40

Davidson v. Gardner, 370 F. 2d 803 (6th Cir. 1966) 34

Espinoza v. Farah Manufacturing Co., 414 U. S. 86 (1973) .. 31

Governors of the United States Postal Service v. Postal Rate Commission, 654 F. 2d 108 (D. C. Cir. 1981) 40

Hardin v. Kentucky Utilities Co., 390 U. S. 1 (1968) 35

In Re United States of America, No. 81-2402 (D. C. Cir., dismissed for lack of jurisdiction April 20, 1982) 40, 41

Kay v. FCC, 443 F. 2d 638 (D. C. Cir. 1970) 39

Lewis Publishing Co. v. Morgan, 229 U. S. 288 (1913) 15

National Association of Greeting Card Publishers v. United States Postal Service, 607 F. 2d 392 (D. C. Cir. 1979), *cert. denied*, 444 U. S. 1025 (1980) 10

National Association of Greeting Card Publishers v. United States Postal Service, 569 F. 2d 570 (D. C. Cir. 1976), *consol'd case vacated on other issues sub nom.* United States Postal Service v. Associated Third Class Mail Users, 434 U. S. 884 (1977) .....*passim*

National Association of Greeting Card Publishers v. United States Postal Service, D. C. Cir. Nos. 76-1611 *et al.* (dismissed June 27, 1978) 10

NLRB v. Brown, 380 U. S. 278 (1965) 31, 32

TABLE OF AUTHORITIES (Continued)

Cases (Continued): Page

Payne v. Washington Metropolitan Area Transit Commission, 415 F. 2d 901 (D. C. Cir. 1969) 40
SEC v. Sloan, 436 U. S. 103 (1978) 32
Soucie v. David, 448 F. 2d 1067 (D. C. Cir. 1971) 34
Southeastern Community College v. Davis, 442 U. S. 397 (1979) 31
Southern Pacific Transportation Co. v. Usery, 539 F. 2d 386 (5th Cir. 1976), *cert. denied*, 434 U. S. 874 (1977) 35, 36
Time, Inc. v. United States Postal Service, Nos. 81-4183 *et al.* (argued April 21, 1982) 5, 41
United Parcel Service, Inc. v. United States Postal Service, 604 F. 2d 1370 (3d Cir. 1979), *cert. denied*, 446 U. S. 957 (1980) 32
United States v. United States Postal Service, No. 81-3206 (D. D. C., dismissed for lack of jurisdiction Dec. 31, 1981) 40
Vaughn v. Rosen, 523 F. 2d 1136 (D. C. Cir. 1975) 34
Volkswagenwerk Aktiengesellschaft v. FMC, 390 U. S. 261 (1968) 32

TABLE OF AUTHORITIES (Continued)

Statutes: Page

15 U. S. C. § 717(c) 20
15 U. S. C. § 717(d) 20
16 U. S. C. § 824(d) 20
16 U. S. C. § 824(e) 20
18 U. S. C. §§ 1693-97 15
28 U. S. C. § 2101(c) 1
28 U. S. C. § 2112(a) 5
28 U. S. C. § 1254(1) 1
39 U. S. C. § 4559 (1964) (repealed 1970) 15
Postal Reorganization Act of 1970, as amended, 39 U. S. C.:
§ 101 *et seq.* 2
§ 101(d) 19, 20
§ 403(c) 20, 40
§§ 601-06 15
§§ 3601-85 2
§ 3621 ..... 18, 20
§ 3622 ..... 4, 7
§ 3622(b) ..... *passim*
§ 3622(b)(1) 12, 14, 20, 38
§ 3622(b)(2) 12, 14, 38
§ 3622(b)(3) ..... *passim*
§ 3622(b)(4) 12, 14, 38
§ 3622(b)(4)-(9) 12, 14, 38
§ 3622(b)(8) 21
§ 3622(b)(9) 12, 14, 38
§ 3623 4
§ 3624 19
§ 3624(d) 21
§ 3625 18
§ 3625(c) 5
§ 3625(c)(2) 5
§ 3625(d) 41

TABLE OF AUTHORITIES (Continued)

Statutes (Continued): Page

46 U. S. C. § 816 20
46 U. S. C. § 817 20
47 U. S. C. § 201 20
47 U. S. C. § 205 20
47 U. S. C. § 721 20
49 U. S. C. § 1376 20
49 U. S. C. § 1482 20
49 U. S. C. § 10701(a) 20
Postal Reorganization Act of 1970, Pub. L. No. 91-375, § 11 (b), 84 Stat. 785 24
Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, 90 Stat. 1303 ..... 21, 38
§ 7, 90 Stat. 1307 38
§ 10, 90 Stat. 1311 21
Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 125, 84 Stat. 1159 (repealed 1979) 35

Agency Decisions:

Opinion and Recommended Decision, PRC Docket No. R71-1 (1972) 7, 31
Opinion and Recommended Decision, PRC Docket No. R74-1 (1975) 7

Legislative Materials:

H. R. 11750, 91st Cong., 1st Sess. (1969) 27
H. R. 17070, 91st Cong., 2d Sess. (1970) 26, 27, 29, 30
H. R. 7700, 95th Cong., 2d Sess. (1978) 39
H. R. Rep. No. 1215, 91st Cong., 2d Sess. (1970), reprinted in 1970 U. S. Code, Cong. & Ad. News 4417 35
Hearings on Postal Modernization Before the Senate Committee on Post Office and Civil Service on S. 3613, 91st Cong., 2d Sess. (1970) 28

TABLE OF AUTHORITIES (Continued)

Legislative Materials (Continued): Page

Hearings on Postal Rates and Revenue and Cost Analysis Before the Subcommittee on Postal Rates of the House Committee on Post Office and Civil Service, Serial No. 91-24, 91st Cong., 2d Sess. (1970) 27

Journal of the House, 91st Cong., 2d Sess. (1970) 34

Journal of the Senate, 91st Cong., 2d Sess. (1970) 34

Postal Service Amendments of 1978: Hearings Before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services on S. 3229 and H. R. 7700, 95th Cong., 2d Sess. (1978) 39

Rule XXVIII.4, Standing Rules of the Senate 35

Rule XXVIII(1)(c), Rules of the House of Representatives 35

S. 3613, 91st Cong., 2d Sess. (March 19, 1970) 28, 29

S. 3613, 91st Cong., 2d Sess., Committee Print No. 4 (March 30, 1970) 28, 30

S. 3842, 91st Cong., 2d Sess. (May 14, 1970) 28, 29, 30, 37

S. 3842, 91st Cong., 2d Sess. (June 3, 1970) 29, 30, 37

S. 3229, 95th Cong., 2d Sess. (1978) 39

S. Rep. No. 912, 91st Cong., 2d Sess. (1970) 15, 19

Statement of the Managers on the Part of the House on H. R. 17070, H. R. Rep. No. 1363, 91st Cong., 2d Sess. (1970), reprinted in 1970 U. S. Code, Cong. & Ad. News 3712 .....14, 30, 33, 34, 35, 37

116 Cong. Rec. 22314 (June 30, 1970) 29

116 Cong. Rec. 22315 (June 30, 1970) 29

116 Cong. Rec. 22344 (June 30, 1970) 29

116 Cong. Rec. 22346 (June 30, 1970) 29

116 Cong. Rec. 26966 (August 3, 1970) 34

116 Cong. Rec. 27606 (August 6, 1970) 35

116 Cong. Rec. 27609 (August 6, 1970) 34

123 Cong. Rec. 36665 (November 2, 1977) 39

123 Cong. Rec. 36666 (November 2, 1977) 39

125 Cong. Rec. S16597 (daily ed., November 14, 1979) 35

TABLE OF AUTHORITIES (Continued)

Other Authorities: Page

46 Fed. Reg. 16404 (March 12, 1981) 5
46 Fed. Reg. 51683 (October 21, 1981) 5
J. Bonbright, *Principles of Public Utility Rates* (1961) 42
Report of the Commission on Postal Service (April, 1977) .. 39
Towards Postal Excellence: The Report of the President's Commission on Postal Organization (June, 1968) ...13, 26, 28

OPINIONS OF THE COURT AND ADMINISTRATIVE AGENCIES BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 663 F.2d 1186 (1a-48a).[1] The order of the court denying rehearing is also reported at 663 F. 2d 1186 (1d-2d). The decision of the Governors of the United States Postal Service, dated March 10, 1981 (1b-140b), and the recommended decision of the Postal Rate Commission, dated February 19, 1981, are not reported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 2, 1981. On January 11, 1982, the court denied a petition for rehearing.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). In accordance with Rule 20.2 of this Court and 28 U. S. C. § 2101(c), the petition for a writ of certiorari in No. 81-1304 and the petition in No. 81-1381 were both filed within 90 days of the order of the court of appeals denying rehearing. On April 19, 1982, both writs were granted and the cases were consolidated.

---

1. References denominated a, b, and c are to Appendices A, B, and C to the Petition for a Writ of Certiorari in No. 81-1304. References denominated d are to Appendix D to the Petition for a Writ of Certiorari in No. 81-1381. References preceded by J. A. are to the Joint Appendix.

STATUTES INVOLVED

The determination of postal rates is governed by the Postal Reorganization Act of 1970, as amended (the "Act"), 39 U. S. C. § 101 *et seq.*, and in particular by Chapter 36 of the Act, 39 U. S. C. §§ 3601-85. Pursuant to that chapter, the United States Postal Service requests the Postal Rate Commission, an independent governmental body, to issue a recommended decision on changes in postal rates and fees. In arriving at its recommended decision, the Commission must follow § 3622(b) of the Act. That section provides:

> "(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) *the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;*
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate." 39 U. S. C. § 3622(b) (emphasis added).

The full text of the pertinent sections of the Act is set forth in Appendix C to the Petition in No. 81-1304 and Appendix D to the Petition in No. 81-1381.

STATEMENT OF THE CASE

A. History of the Case

The administrative proceeding that led to these consolidated cases was initiated on April 21, 1980, when the United States Postal Service ("Postal Service") filed a request for rate and classification changes with the Postal Rate Commission ("Commission") pursuant to §§ 3622 and 3623 of the Act, 39 U. S. C. §§ 3622, 3623. In its request, heard as Commission Docket No. R80-1, the Postal Service proposed changes in the rates for virtually every class of mail and type of postal service, including an increase of 33⅓% (from 15¢ to 20¢) for the first ounce of first class letter mail, where the Postal Service enjoys a statutory monopoly, and an increase of 8.3% for fourth class parcel post where the Postal Service competes with private enterprise package carriers such as Petitioner United Parcel Service ("UPS") (J. A. 41a, 46a).

UPS and more than 50 other parties intervened in the Commission proceedings. UPS is a regulated motor carrier that provides its parcel delivery service as a common carrier throughout the 48 contiguous states, the District of Columbia, on Oahu, Hawaii, and in Anchorage, Alaska (J. A. 245a-46a). UPS competes primarily with the Postal Service's parcel post service, but also handles parcels that could move in other subclasses of mail that offer special rates for commodities such as books, sound recordings, and catalogs (J. A. 248a).

After extensive en banc hearings, the Commission issued its initial Opinion and Recommended Decision on February 19, 1981. The Commission recommended the adoption of rates different in most instances from those requested by the Postal Service. With respect to first class letter mail, the Commission recommended a 20% rate increase (from 15¢ to 18¢), rather than the 33⅓% increase proposed by the Postal Service (R. 30870). In the case of parcel post, the Commission recommended a rate increase

of 13.3% rather than the 8.3% proposed by the Postal Service (R. 31359, J. A. 46a).[2]

In a decision dated March 10, 1981, the Governors of the Postal Service allowed most of the rates recommended by the Commission to take effect under protest, including the Commission's recommended rates for first class letters and for parcel post (1b). See 39 U. S. C. § 3625(c). The Governors also directed that the Recommended Decision be returned to the Commission for reconsideration and a further recommended decision under 39 U. S. C. § 3625(c) (2) (1b). On March 22, 1981, the Postal Service put into effect the Commission-recommended rates that had been allowed under protest.[3] 46 Fed. Reg. 16404 (March 12, 1981).

---

2. If the Postal Service's proposed rates had been adopted, the rates for first class mail would have been increased by 233% since 1970, and parcel post rates would have been increased by only 86% in the same period, while the Consumer Price Index increased by 135% (J. A. 250a).

3. The subsequent history of the administrative proceeding is not before the Court or necessary to its consideration of the issues here presented. However, on June 4, 1981, the Commission issued its Opinion and Recommended Decision upon Reconsideration. 46 Fed. Reg. 51683 (October 21, 1981). With one minor exception, the Commission adhered to the recommendations in its initial decision. The Governors, in a decision dated June 29, 1981, purported to reject the rates recommended by the Commission. *Id.* After further reconsideration, the Commission once more reaffirmed its recommendations in a decision issued on September 17, 1981. *Id.* On September 29, 1981, the Governors responded by changing most, but not all, of the Commission's rates in an effort to generate almost $1 billion of additional revenue that the Commission had removed from the Postal Service's requested revenue requirement. The Governors increased the rate for the first ounce of first class letter mail from 18¢ to 20¢, but allowed parcel post rates to remain at the level established in March, 1981. The new rates were implemented on November 1, 1981. *Id.* Appeals from the Governors' September 29 order are awaiting decision by the Second Circuit. *Time, Inc. v. United States Postal Service,* Nos. 81-4183 *et al.* (argued April 21,

Appeals from the Governors' order were filed in the Court of Appeals for the Second Circuit ("Second Circuit") and in the Court of Appeals for the District of Columbia Circuit ("D. C. Circuit"). The D. C. Circuit appeals were transferred to the Second Circuit under 28 U. S. C. § 2112(a). On November 2, 1981, the Second Circuit remanded the matter for further consideration in light of its opinion. *Newsweek, Inc. v. United States Postal Service*, 663 F. 2d 1186 (2d Cir. 1981) (1a-48a) ("*Newsweek*").

Because the Second Circuit's decision was in announced conflict with prior decisions of the D. C. Circuit (see pages 8-12, *infra*) and seriously misconstrued the Act and its legislative history, UPS sought certiorari from this Court, as did the National Association of Greeting Card Publishers representing the interests of first class mailers. Both petitions were supported by the Solicitor General on behalf of the Postal Service. Certiorari was granted on April 19, 1982.

B. History of Postal Ratemaking

The central issue in this case is the proper construction of the costing provision contained in the ratemaking section of the Postal Reorganization Act. That provision, 39 U. S. C. § 3622(b)(3), has been construed by the Commission and by the D. C. Circuit in prior postal rate cases.

In the first rate proceeding conducted under the Act (Commission Docket No. R71-1), the Postal Service took the position that the Act "required that attributable costs be measured by short-run costs" (J. A. 297a). The Postal

3. (Cont'd.)

1982). As the Solicitor General, representing the Postal Service, and we have pointed out, these subsequent events do not render these cases moot. Brief of Respondent United States Postal Service dated March 1, 1982, at 9-12, and Brief of Petitioner United Parcel Service of America, Inc. in Reply to Brief of Direct Mail/Marketing Association, Inc., on the question whether certiorari should be granted, dated April 8, 1982, at 3 n. 2.

Service there argued that a particular cost is "attributable" within the meaning of the Act only "if it varies in direct proportion to mail volume on a year-to-year basis." *Opinion and Recommended Decision,* PRC Docket No. R71-1 (1972) ("R71 Opinion"), at 48, quoted at J. A. 296a-97a. Under that approach, the Postal Service in its request attributed 50% of total postal costs on a cost-of-service basis (J. A. 239a). It allocated the remaining 50% (over $4.7 billion) (J. A. 239a) on a subjective pricing basis.

In his initial decision in that case, the Commission's Chief Examiner recommended a "long-run" costing approach to attribution rather than the Postal Service's short-run approach, but deferred adoption of a definitive interpretation of the Act (J. A. 301a-06a). The Commission also specifically rejected the Postal Service's argument that the Act limits attributable costs to short-run costs but left the interpretation of § 3622 to the future (J. A. 297a, 303a, 313a). The Commission did specifically state, however, "that the statute—far from requiring any particular method—actually envisions consideration of *all* appropriate costing approaches." R71 Opinion at 46, quoted at J. A. 297a (emphasis added). Having declared these guidelines, the Commission nevertheless accepted, for that proceeding, the Postal Service's cost attributions and the proposed rates based thereon because the record did not contain any alternative approaches (J. A. 301a, 313a).

On appeal in that first case, the D. C. Circuit affirmed the Commission. In a unanimous concurring opinion, however, the court discussed the central role of § 3622(b)(3) in postal ratemaking. *Association of American Publishers, Inc. v. Governors of the United States Postal Service,* 485 F. 2d 768, 776-79 (D. C. Cir. 1973) (*"American Publishers"*) (Bazelon, C. J., Tamm, J., and Wyzanski, D. J.).

In the second rate case (Commission Docket No. R74-1), the Postal Service adhered to its short-run variable costing approach, and the Postal Service's proposed at-

tributable costs actually decreased from the 50% of total costs arrived at in the first proceeding to 45% of total costs (R. 31681).

This time, the Commission's Chief Administrative Law Judge, using a long-run variable costing approach supplemented by conventional cost accounting techniques, made major modifications to the Postal Service's proposals. Although it rejected many of the specific attributions of its Chief Administrative Law Judge, the Commission, based on its review of the legislative history of the Act and on economic theory (J. A. 317a), "adopted the long-run variable cost approach to attributions that the examiner had recommended in his initial decision in R71-1" because, in the Commission's view, "long-run variability provide[s] the best basis for an objective determination of cost causation" (J. A. 316a, 317a).

Nevertheless, the Commission attributed only 53% of total postal costs, and distributed the remaining costs to the various classes of mail on a subjective pricing basis (J. A. 319a). The Commission consciously chose not to attribute certain costs that it agreed were attributable costs (J. A. 317a). As the Commission later described its own action, "The Commission took a narrow, legalistic, traditional approach to using legislative history to interpret the statutory term attributable cost. . . . It looked for explicit definitions of the word attributable" (J. A. 323a).

It was against this background that the D. C. Circuit first specifically decided the statutory interpretation issues involved here. *National Association of Greeting Card Publishers v. United States Postal Service,* 569 F. 2d 570 (D. C. Cir. 1976), *consol'd case vacated on other issues sub nom. United States Postal Service v. Associated Third Class Mail Users,* 434 U. S. 884 (1977) ("*NAGCP-I*") (Bazelon, C. J., Robinson and MacKinnon, JJ.). The court explicitly refused to endorse any particular costing methodology or any prespecified percentage of cost attribu-

tion. 569 F. 2d at 590 ("Our task, of course, is not to prescribe an acceptable percentage level of attribution."), 590 n. 81 (". . . our decision does not rest on any determination that a certain percentage level of attribution is dictated by subsection 3622(b)(3)."), 592-93. However, the court found that, "by the Commission's own account, [the Commission] did not attribute to each class all the costs that likely were the result of providing the particular service." *Id.* at 581 (footnote omitted). In the court's view, this result flowed from the "stricture of [the Commission's] approach," which had as its "linchpin . . . an abiding concern for the greatest possible accuracy in measuring causation." *Id.* at 581, 583.

Accordingly, the D. C. Circuit held that ". . . the Act requires that special efforts be made to trace *all* the cost consequences of providing the various services," and it rejected the Commission's "almost exclusive reliance on a cost variability approach to attribution" to the disregard of "alternative approaches . . . designed simply to go beyond the inferences of causation presently derivable under a cost variability theory." *Id.* at 585, 592 (footnotes omitted) (emphasis added). Based upon its analysis, the court held:

> "Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act." *Id.* at 589 (footnote omitted).

The Postal Service and the Commission had their first opportunity to respond to *NAGCP-I* in the fourth general rate case (Commission Docket No. R77-1).[4] In its recommended decision, the Commission attributed 65% of total costs (R. 30970 n. 1). The Commission accepted the Postal Service's suggested method for allocating "reasonably assignable" costs and assigned approximately 10% of total costs on that basis (R. 30970 n. 1). The Commission then distributed the remaining 25% (almost $4.5 billion) (J. A. 239a) on the basis of the other factors listed in § 3622(b) of the Act.

In upholding the Commission's actions in that case, a different panel of the D. C. Circuit reaffirmed the *NAGCP-I* interpretation of the Act. *National Association of Greeting Card Publishers v. United States Postal Service,* 607 F. 2d 392, 402 n. 23 (D. C. Cir. 1979), *cert. denied,* 444 U. S. 1025 (1980) (*"NAGCP-III"*) (Tamm and Leventhal, JJ., and Bryant, D. J.) ("If we were convinced *NAGCP I* was fatally flawed, our recourse would lie in a request for en banc consideration. We do not initiate that course"). The court accepted the "service related costs" method first advocated by the Postal Service and then used by the Commission to assign certain unattributed postal costs, even though the court believed that particular method had imperfections. 607 F. 2d at 406-12.

The present case involves the fifth general postal rate proceeding conducted under the Act. In the administrative proceeding, the Commission rejected requests by a number of parties that it not follow the interpretation of § 3622(b)(3) announced in *NAGCP-I* and reaffirmed in *NAGCP-III,* stating:

---

4. The Commission issued its recommended decision in the third case before the court decided *NAGCP-I.* The appeals in the third case, *National Association of Greeting Card Publishers v. United States Postal Service,* D. C. Cir. Nos. 76-1611 *et al.* (June 27, 1978), were dismissed as moot (J. A. 257a). In that third case, the Commission had attributed approximately 60% of total postal costs (J. A. 240a).

> "We will adhere to the basic costing procedures developed in R77-1 [the prior rate case] and refine and improve them. . . . The court of appeals' acceptance in *NAGCP III* of our R77-1 costing techniques indicates that it is possible to develop an economically rational costing approach while working within the constraints of *NAGCP I*. . . . [T]he use of longer-run volume variability combined with analysis of nonvolume-related cost-causing factors has produced cost distributions that promote economic efficiency to the extent permitted by the Act" (R. 30973-74).

As in the prior case, the Commission used a long-run variable costing approach to attribute approximately 64% of total postal costs (J. A. 295a). It also reasonably assigned an additional 10% of total costs on a costing basis (J. A. 295a). The remaining 26% of total costs—or almost $6 billion—was allocated on the basis of the non-cost factors listed in the Act (J. A. 295a).

The Governors of the Postal Service allowed most of the Commission's rates to take effect under protest, and appeals from the Governors' order were decided by the Second Circuit (see pages 5-6, *supra*). In an opinion by Circuit Judge Meskill, joined in by Circuit Judge Kearse and District Judge Coffrin, that court held:

> ". . . [A]s to the level of attribution required, we conclude that the definition of that term [in a statement issued by the House Managers referring to 'costs, both direct and indirect, that vary over the short term'] is controlling. Therefore, we reject the D. C. Circuit's rulings to the extent that they interpreted section 3622(b) as requiring the attribution and assignment of costs based on cost-of-service principles to the maximum extent possible. There is nothing in the legislative history to suggest that attribution of fifty percent of postal costs is inadequate." *Newsweek*, 663 F. 2d at 1200, 27a (footnote omitted).

In endorsing the attribution on a costing basis of only 50% of total postal costs, the Second Circuit approved limiting the attribution of costs required by § 3622(b)(3) to the short-run variable costing methodology used by the Postal Service to attribute 50% of total costs in the first rate case conducted under the Act.

The Second Circuit also held that the clause in § 3622 (b)(3) referring to "that portion of all other costs of the Postal Service reasonably assignable to" each class of mail was intended merely to require consideration of all of the other ratemaking factors listed in subsections (1)-(2) and (4)-(9) of § 3622(b). 663 F. 2d at 1202, 31a. Thus, unlike the D. C. Circuit's adoption of a three step approach to postal ratemaking, the Second Circuit held that the statute establishes a two step approach—the determination of "attributable" costs that are allocated to the various classes of mail on a short-run variable costing basis, and the reasonable assignment of the remaining unattributed costs on the basis of the more discretionary factors of § 3622(b).

SUMMARY OF ARGUMENT

Section 3622(b)(3) of the Postal Reorganization Act requires that postal rates be based, to the extent possible, on costing principles rather than on more subjective and potentially discriminatory and exploitative pricing considerations. This is evident from the plain language of the Act, which lists eight specific factors to be considered in postal ratemaking but characterizes the costing factor, and only that factor, as a "requirement."

The requirement in § 3622(b)(3) that each class of mail bear the costs attributable to that class is not limited in any way by the statutory language. Instead, the broad and all-inclusive language of the attributable cost requirement, which refers to the "*direct and indirect* postal costs attributable to" each class of mail (emphasis added), establishes that, as the D. C. Circuit has consistently held, the determination of attributable costs is not confined to any particular costing approach. Thus, the holding of the Second Circuit approving the limitation of attributable costs to short-run variable costs is contrary to the plain language of the statute.

The holding of the Second Circuit is also contrary to the legislative history of the Act, which makes it clear that attributable costs are not limited to short-run variable costs but rather include *all* costs—short-run variable, long-run variable, and even fixed costs—that are a consequence of providing service to each class of mail. The limitation of the attributable cost requirement to short-run variable costs is contrary to the report of the presidential commission (the Kappel Commission) that was created to make recommendations on postal reform, to the history of the House and Senate bills that led to the Act, and, despite the Second Circuit's mistaken belief to the contrary, to the Postal Rate Commission's own interpretation of the Act. In fact, Congress has endorsed the interpretation of the D. C. Circuit in *NAGCP-I* by not adopting legislation that was introduced for the express purpose of overruling that interpretation.

The only language in the legislative history that the Second Circuit found to support its holding was one phrase in a sentence it believed was part of the report of the Conference Committee that resolved the differences between the House and the Senate. However, the Second Circuit was mistaken; the phrase in question is not part of the Conference Committee Report. Instead, it is from a statement that was never presented to the Senate but rather was issued by the House Managers, whose position had been unequivocally rejected by the Conference Committee.

The Second Circuit also erred in holding that the clause contained in subsection (3) of § 3622(b) referring to "costs . . . reasonably assignable" to each class of mail was meant by Congress merely to incorporate the factors separately listed in subsections (1)-(2) and (4)-(9) of § 3622(b), rather than to refer to reasonable *costing* assignments. The "reasonably assignable" clause is part of the costing subsection, and it does not even allude to the other factors in § 3622(b). Moreover, the legislative history makes it clear that the term "assignable" was intended to refer to the costing process, not the pricing process.

The Second Circuit's interpretation of § 3622(b)(3) would not achieve the congressional purpose of insuring that the monopoly over first class letter mail not be abused and that other classes of mail, particularly those classes that compete with private enterprise carriers such as UPS, would not be subsidized by revenues from first class mail. If the purpose of the ratemaking section of the Act is to be fulfilled, the Commission must be required to attribute and assign to the various classes of mail to the maximum extent possible all of the postal costs that are caused by those classes, as the D. C. Circuit has held. The history of postal ratemaking under the Act clearly demonstrates that the D. C. Circuit's interpretation of the costing provision leaves a meaningful role for the other, more discretionary factors of the Act in establishing postal rates.

ARGUMENT

I. The Holding of the Second Circuit Represents an Aberration That Would Undo More Than a Decade of Progress in Postal Ratemaking.

Before passage of the Act in 1970, Congress established the rates for most classes and subclasses of mail. As a result, the postal rate structure reflected the political pressures exerted on Congress by lobbyists representing major mailers who use the specialized classes of mail—second class mail (newspapers and magazines), third class mail (generally printed advertisements sent by large commercial mail marketing groups), and certain subclasses of fourth class mail, such as special rate fourth class mail (generally books and sound recordings sent by book and record clubs).[5] It is not surprising that, under that system, there was wholesale discrimination against users of first class letter mail, which has always been subject to a statutory monopoly vested in the Postal Service under the so-called Private Express Statutes, 18 U. S. C. §§ 1693-97, 39 U. S. C. §§ 601-06. *See Lewis Publishing Co. v. Morgan*, 229 U. S. 288, 303-04 (1913).

When Congress passed the Act, it sought to insure the elimination of this historic postal rate discrimination against first class mail users based on "purely political judgments" such as "charging whatever the traffic will bear to a particular class of mail according to its ability to pay." S. Rep. No. 912, 91st Cong., 2d Sess., at 11 (1970) ("Senate Report"). To effectuate that purpose, Congress adopted § 3622(b)(3), which provides that the Commis-

5. Under former 39 U. S. C. § 4559 (1964) (repealed 1970), the rates for zone-rated fourth class mail (parcel post and catalogs weighing 16 ounces and more) were subject to the Interstate Commerce Commission under a statutory requirement that the revenues from the rates for those services not vary by more than four percent from the fully distributed costs of those subclasses.

sion's recommended rate decisions must be in accordance with

> "(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type."

Despite the Congressional "requirement" that the rates for each class of mail recover the direct and indirect costs attributable to the class, the Postal Service has never willingly attributed more than 50% of its costs to the various classes of mail and has consistently sought to allocate the remaining costs under more subjective and discretionary pricing factors. Indeed, before the Commission and the D. C. Circuit began to require the Postal Service to improve its cost attributions, the Postal Service actually reduced its proposed attributable costs from 50% in the first rate case to 45% in the second case (R. 31681).

As the history of postal ratemaking set forth above indicates (pages 6-11), both the Commission and the D. C. Circuit disapproved from the first the Postal Service's failure to attribute more than short-run variable costs. As a result, the costs attributed to specific classes of mail increased from 50% in the first proceeding to more than 64% in this case. At the same time, the D. C. Circuit recognized that some of those costs that had not been attributed to the classes of mail nevertheless could be rationally assigned among the classes on a cost-of-service basis, and it interpreted the "costs . . . reasonably assignable to [each] class" language of § 3622(b)(3) to require the assignment of such costs to the various classes of mail on a cost-of service basis. Thus, the Commission in this proceeding assigned on a costing basis an additional 10% of total costs in response to that holding. Yet, a residue of approximately $6 billion of unattributed and unassigned costs remains, so that postal rates also significantly reflect the more discretionary factors set forth in § 3622(b).

After more than ten years in which Congress, the Commission, and three different panels of the D. C. Circuit all acted to increase the extent to which postal rates reflect the cost of providing the various classes of service rather than subjective political judgments, the Second Circuit's decision represents a complete "about face." In particular, the Second Circuit has held that the Act permits the cost floor to the rates for each class of mail to include only those costs that vary with mail volume over the short term, or as little as 50% of total postal costs. In short, in the view of the Second Circuit, the substantial progress in postal ratemaking achieved over more than a decade may be ignored and postal ratemaking may revert to the state that existed in 1970, when the Postal Service attributed only 50% of total postal costs. Indeed, in this case, short-run variable costs comprise only 51% of total postal costs (J. A. 294a-95a). Clearly, the Second Circuit is out of step with advances made in postal ratemaking since the Act was passed more than a decade ago.

A too quick reading of the Second Circuit's decision might cause one to conclude that, under that decision, the Commission may, as a matter of administrative discretion, go beyond short-run variable costs in determining the attributable costs of each class of mail. *Newsweek*, 663 F. 2d at 1201, 27a-28a. However, the Second Circuit makes it clear twice in its opinion that, in its view, attributable costs under § 3622(b)(3) are limited to short-run variable costs, and that other costing methods may be used only as discretionary "reasonable assignments" under the other factors of § 3622(b). *Id.* at 1200, 1202, 27a, 31a.

Furthermore, the Second Circuit's suggestion that the Commission is free to use, as part of the reasonable assignment of unattributed costs, costing approaches that go beyond short-run variable costs still does not insure, as a matter of statutory requirement, that first class monopoly mail will not cross-subsidize other classes of mail. It is of course possible that the rates recommended by the Commission under the Second Circuit's interpretation could be

the same as rates recommended on the basis of the D. C. Circuit's interpretation, even though the cost floor would be materially lower under the Second Circuit's interpretation than under the D. C. Circuit's interpretation. *Newsweek*, 663 F. 2d at 1201, 27a-28a. However, the Postal Service has made it clear that it disagrees with the D. C. Circuit's holding that the "reasonably assignable" clause of § 3622(b)(3) requires the assignment on a costing basis of some portion of unattributed costs (J. A. 255a, 258a, 267a). The Postal Service has in every case sought to maximize the use of pricing rather than costing considerations in setting postal rates. Under § 3621 and § 3625 of the Act, 39 U. S. C. §§ 3621, 3625, the Governors of the Postal Service may accept, allow under protest, reject, or, in certain circumstances, even modify the rates recommended by the Commission as they did in this case (see page 5 n. 3, *supra*). The Governors would no doubt seize upon the additional discretion to use subjective pricing considerations rather than costing principles to "reasonably assign" unattributed costs.

In short, unless the Second Circuit decision at issue here is reversed, postal rates will in the future not comply with the requirements of the Act as correctly interpreted by the D. C. Circuit.

II. The Holding of the Second Circuit Is Contrary to the Purpose, the Language, and the Legislative History of the Act.

The fundamental issue in this case is the extent to which the Postal Reorganization Act requires the Postal Rate Commission to base its rate recommendations on costing principles rather than on pricing considerations. UPS' challenge to the holding of the Second Circuit does not involve the propriety of the particular costing methods used by the Commission in attributing or assigning those costs that the Commission found to be attributable or assignable on a cost-of-service basis. Instead, UPS here challenges that court's interpretation of the guide-

lines for postal ratemaking established by § 3622(b) of the Act, particularly its interpretation of the costing requirement in § 3622(b)(3).

A. A Primary Goal of the Act Is to End the Historic Discrimination Against Captive First Class Mail Users and the Resulting Subsidization of Users of Other Classes of Mail Competitive With Private Enterprise.

That Congress wanted to restrict the almost unlimited discretion characteristic of the political ratemaking process in order to protect users of first class mail is clear from the Senate Report:

> "The recent proposal for a 10-cent first-class stamp in order to raise sufficient revenue to balance the books of the Post Office in one single step is fair proof of [the] quest for catching up with costs. . . . The temptation to resolve the financial problems of the Post Office by charging the lion's share of all operational costs to first class is strong; that's where the big money is. The necessity for preventing that imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management." Senate Report at 13.

To insure that the lobbyists did not merely redirect their efforts from Congress to the Postal Service, Congress established an independent Commission that would "view the overall impact of postal costs with a degree of detachment" (*id.*) and make rate recommendations on a record created in public hearings. See 39 U. S. C. § 3624. Furthermore, Congress adopted provisions to insure that the Commission's rate recommendations would follow the general policy that "Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." 39 U. S. C. § 101(d). The Act also provides that postal rates shall

be "reasonable and equitable" and not unduly discriminatory or preferential among users. 39 U. S. C. §§ 3621, 403(c).

Of course, the mandate in the Act that rates be fair and equitable, and the prohibition against undue rate discrimination and preferences, are typical of ratemaking statutes.[6] Uniquely, however, in the case of postal rates Congress went even further and specifically included in the ratemaking section of the Act

> "the *requirement* that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." 39 U. S. C. § 3622(b)(3) (emphasis added).

---

6. *See, e.g.*, 15 U. S. C. §§ 717c, 717d (requiring natural gas company rates to be "just and reasonable," prohibiting "any undue preference or advantage" and "any unreasonable difference in rates," and authorizing the FPC, now the Federal Energy Regulatory Commission, to determine the "just and reasonable" rate); 16 U. S. C. §§ 824d, 824e (requiring "just and reasonable" rates for electric utilities, prohibiting "any undue preference or advantage" and "any unreasonable difference in rates," and authorizing the FPC to determine "the just and reasonable rate"); 46 U. S. C. §§ 816, 817 (providing that the rates of common carriers by water may not be "unjustly discriminatory" or "unjustly prejudicial" and authorizing the Federal Maritime Commission to prescribe "just and reasonable" rates); 47 U. S. C. §§ 201, 205 (providing that the rates of communications common carriers subject to FCC regulation must be "just and reasonable"); 47 U. S. C. § 721(c)(2) (requiring the FCC to insure "nondiscriminatory use" of Comsat facilities under "just and reasonable charges"); 49 U. S. C. § 1376 (authorizing the CAB to determine "fair and reasonable rates of compensation for the transportation of mail by aircraft"); 49 U. S. C. §§ 1482(d), (f), (h), (i), and (j) (requiring the CAB to prescribe "just and reasonable" rates for air carriers if the prevailing rates are "unjust or unreasonable" or "unjustly discriminatory, or unduly preferential or unduly prejudicial"); 49 U. S. C. § 10701(a) (requiring rates of carriers subject to the jurisdiction of the ICC to be "reasonable").

By this language, Congress explicitly restricted the discretion that might otherwise have been available to the Commission under the general requirement of fair, equitable, and nondiscriminatory rates.

The Second Circuit's devaluation of the § 3622(b)(3) costing requirement is contrary to this Congressional purpose of limiting the extent to which discretionary judgments may override cost-of-service principles and be used to justify higher rates for first class monopoly mail and lower rates for competitive classes of mail.

B. The Act Does Not Limit Attributable Costs to Short-Run Variable Costs, But Instead Provides That All Costs Incurred to Provide Service to a Class of Mail Must Be Attributed to the Class.

1. The Plain Language of the Act Requires the Commission to Attribute to Each Class of Mail All Costs, Direct and Indirect, Incurred in Providing Service to the Class.

The goal of insuring that postal rates be based, as far as possible, on relatively more objective cost-of-service principles rather than primarily on more subjective, discretionary judgments is evident from the plain language of the Act. Section 3622(b) lists eight specific factors to guide postal ratemaking.[7] In recommending postal rates, the Postal Rate Commission must consider all of these factors, and its decision must "include a statement specifically responsive to" those criteria. 39 U. S. C. § 3624(d). But significantly, the § 3622(b)(3) costing provision that refers to the "direct and indirect postal costs attributable to [each] class or type [of mail] plus that portion of all other costs of the Postal Service reasonably

7. The Act as originally passed contained seven specific factors. The eighth—"the educational, cultural, scientific, and informational value to the recipient of mail matter," 39 U. S. C. § 3622(b)(8)—was added in 1976. Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, § 10, 90 Stat. 1303, 1311.

assignable to such class or type" is the only provision in § 3622(b) that is specifically characterized as a "requirement," underscoring the primary role of the costing process in postal ratemaking.

The D. C. Circuit recognized the unmistakable emphasis that Congress placed on costing principles by using the term "requirement" in § 3622(b)(3). *See, e.g., NAGCP-I,* 569 F. 2d at 585. On the other hand, the Second Circuit rejected the notion that "Congress intended primary importance to attach to" § 3622(b)(3). *Newsweek,* 663 F. 2d at 1197, 21a. Yet even the Second Circuit had to qualify its statement that § 3622(b) "places no special emphasis upon subdivision (3)" by adding the words *"other than by inserting the word 'requirement' in that subdivision." Id.* (emphasis added). In terms of statutory construction, this is equivalent to asserting that the Constitution places no special emphasis on individual rights other than by including the Bill of Rights.

If § 3622(b)(3) had been intended to be just another one of the eight factors specified in that section, Congress would merely have provided that the Commission's decision must be

> "in accordance with the policies of this title and the following factors:
>
> * * *
>
> "(3) the direct and indirect postal costs attributable to each class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type."

However, Congress went to the trouble of adding the following italicized words to subsection (b)(3), but not to any other subsection, so that the Act provides that the Commission's decision must be "in accordance with . . . (3) *the requirement that each class of mail or type of mail service bear*" those costs attributable and reasonably assignable to the class. 39 U. S. C. § 3622(b)(3) (emphasis added).

Of course, the Second Circuit was correct in noting that the Act "provides that the PRC 'shall' consider *all* of the enumerated factors." *Newsweek*, 663 F. 2d at 1200, 27a. However, the difference between § 3622(b)(3) and the other factors listed in § 3622(b) is that, while the Commission must *consider* all eight specific factors, it is subject to a *requirement* that each class of mail "bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type."

The Second Circuit acknowledged that Congress attached primary importance to the costing factor when it said:

> "We are convinced that the only 'legislative direction as to precisely what gravity each factor' in section 3622(b) should bear is the *'requirement'* in subdivision (b)(3) that each class or service bear as a minimum the direct and indirect costs attributable to that class or service." *Id.* at 1200, 27a (emphasis added).

Clearly, the court could not escape the fact that § 3622 (b)(3) establishes a cost floor to the rates for each class of mail, below which the rates for the class may not fall. By holding that the Act establishes an explicit cost floor to the rates for each class of mail, the court necessarily acknowledges the primary importance of costing principles in the establishment of proper postal rates. Otherwise, there would not be any requirement that, "as a minimum," there be an attributable cost floor to rates.

The Second Circuit made one final argument in its attempt to downplay the importance of the costing process in postal ratemaking. After finding that the explicit use of the "requirement" clause in § 3622(b)(3) but not in the other subsections "is too tenuous a ground upon which to base" the D. C. Circuit's holding that postal

rates must be based on cost-of-services principles to the maximum extent possible, the Second Circuit emphasized the fact that the subdivision (3) requirement was not "placed at the top of the list of factors." 663 F. 2d at 1197, 21a. Surely, it is clear error thus to undermine the plain, mandatory language of a provision in a statute because that provision is not the first of several items in the section. *See* Postal Reorganization Act of 1970, Pub. L. No. 91-375, § 11(b), 84 Stat. 719, 785.[8]

Moreover, the addition of the "requirement" clause to § 3622(b)(3) is not the only indication in the statute that Congress intended postal rates to be based on costing principles to the extent possible. Section 3622(b)(3) requires "that each class of mail . . . bear the *direct and indirect* postal costs attributable to that class or type." Congress could have provided that each class of mail must bear "the postal costs attributable to that class." The fact is that Congress explicitly referred in § 3622(b)(3) to "the direct and indirect" postal costs attributable to a class of mail, undoubtedly to emphasize that the cost attribution process should not be limited, for example, by any technical notions of direct costing.

As the D. C. Circuit recognized, the use of the "direct and indirect" language "suggest[s] a substantial breadth to [the subsection's] coverage." *NAGCP-I*, 569 F. 2d at 585. That is, Congress made it clear that the Commission not only must include in the rate floor for each class the direct costs that are most easily identified as being caused by the class, but also must attribute indirect costs that are more remotely related to, but nevertheless are the consequence of, providing service to the class. Surely, "direct and indirect" costs include more than those costs that vary with volume over the short term. *See NAGCP-I*, 569 F. 2d at 586. Between them, those terms include all postal costs of any nature, whether variable in the short term, variable in the long term, or fixed.

8. Section 11(b) of the Act was not codified as part of 39 U. S. C.

In summary, the legal test of whether a cost is "attributable" to a class of mail under § 3622(b)(3) is not whether the cost will vary with changes in mail volume over some period of time, but rather whether the cost is caused by or is a consequence of providing service to the class of mail.

2. The Legislative History of the Act Supports the Plain Reading of the Statutory Language That All Costs Caused by a Class of Mail, Not Just the Short-Run Variable Costs of the Class, Must Be Attributed to the Class.

The legislative history of the Act also makes it clear that the Second Circuit's limitation of the attributable cost requirement to short-run variable costs is erroneous.

Once having acknowledged that the Act does establish a costing requirement, the Second Circuit did not analyze the nature of that costing requirement. Instead, it held that the Act requires no more than a short-run variable costing test for attribution simply by declaring, ". . . as to the level of attribution required we conclude that the definition of that term [in a statement issued by the House Managers referring to 'costs, both direct and indirect, that vary over the short term'] is controlling." 663 F. 2d at 1200, 27a. The court underscored its intention by concluding, "There is nothing in the legislative history to suggest that attribution of fifty percent of postal costs is inadequate." *Id.* (footnote omitted).

Had the court thoroughly examined the Act's legislative history, it would have found that the D. C. Circuit was right in holding that this history, like the plain language of the Act, requires all reasonable costing approaches, not just short-run variable costing, to be used in order to insure that each class of mail will bear all costs attributable to it.

Postal reform began in earnest when a presidential commission, chaired by Frederick R. Kappel and com-

monly referred to as the Kappel Commission, presented its report on postal reform in 1968. *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* (June, 1968) ("Kappel Report"). The Kappel Commission recommended that "each service should recover at least the full additional costs of that service *over the long run.*" Kappel Report at 74 (emphasis added). *See also* Kappel Report at 131 ("In economic terms, each class should bear, as a minimum, *the long-run variable costs* ascribable to it . . . .") (emphasis added).

The history of the House and Senate bills that led to the Act establishes that attributable costs go beyond even variable costs, both short-run and long-run. The House had proposed language requiring each class of mail to recover "at least those costs demonstrably related to the class . . . ." H. R. 17070, 91st Cong., 2d Sess., § 1201(c) (1970).[9] The concept of "demonstrably related costs" had its origin in the Kappel Report, which stated, "A utility is not allowed to discriminate unduly among its users in the pricing of its services: one class of users may not be charged with *costs demonstrably related* to another class." Kappel Report at 130 (emphasis added).

The Kappel Commission made it clear that, in using the phrase demonstrably related costs, it meant more than short-run variable costs. Indeed, it explicitly identified its concept of demonstrably related costs with a long-run variable costing approach: "In economic terms *each class should bear, as a minimum, the long-run variable costs ascribable to it—the full added costs demonstrably related to that class.*" Kappel Report at 131 (emphasis added).

---

9. Section 1201(c) was limited by § 1201(d) of H. R. 17070, which provided that, "Notwithstanding the other provisions of [§ 1201]," the Postal Service should take account of the financial impact of its rates on users. Thus, postal rates for any class could have been set below the so-called minimum cost floor of § 1201(c) of the House bill whenever the Postal Service believed that the rates for a particular class would otherwise be too high.

The Kappel Commission's demonstrably related costs language was part of the House bill originally introduced on behalf of the Post Office Department by Congressman Udall. H. R. 11750, 91st Cong., 1st Sess., § 1201(c) (1969). It was retained in the bill passed by the House. H. R. 17070, 91st Cong., 2d Sess., § 1201(c) (1970).[10] Even though the phrase as used by the Kappel Commission referred to *all* costs caused by a class of mail, including both short-run variable and long-run variable costs, the Post Office Department, during congressional hearings on a proposed rate increase held while the House bill on postal reform was pending, embraced the demonstrably related costs language and distorted the Kappel Commission's original concept by redefining demonstrably related costs as short-run variable costs. *See, e.g., Hearings on Postal Rates and Revenue and Cost Analysis Before the Subcommittee on Postal Rates of the House Committee on Post Office and Civil Service,* Serial No. 91-24, 91st Cong., 2d Sess., at 3 (1970), where, in April of 1970, Assistant Postmaster General Hargrove testified, "We have settled on a shorter term approach since the length of an appropriate longer term would be a very difficult thing to decide upon, and ratemaking—being a continuous process—can take the longer term effect into account when it occurs." Thus, by the time the Conference Committee met to resolve the differences between the House version of postal reform legislation and the Senate version, the demonstrably related costs language of the House bill had become confused with the Post Office Department's newly instituted costing system that, as Assistant Postmaster General Hargrove testified, was based on the concept of short-run variable costs.

However, the Senate clearly was unwilling to limit the costs that must be covered by each class of mail to the

10. As we will show (pages 29-30, *infra*), the demonstrably related costs language of the House bill was never accepted by the Senate and was ultimately rejected by the Conference Committee.

short-run variable costs of the class. The original Senate bill (S. 3613) provided that the Commission's recommended rates must be based on "the amount of operating costs, *overhead, and other institutional costs* of the [Postal Service] *properly attributable* to each class of mail in proportion to its share of mail volume." S. 3613, 91st Cong., 2d Sess., § 3703(c)(2) (March 19, 1970), printed in *Hearings on Postal Modernization Before the Senate Committee on Post Office and Civil Service on S. 3613*, 91st Cong., 2d Sess. 964, 1039 (1970) (emphasis added). Thus, from the beginning, the Senate associated the concept of attributable costs not only with operating costs but also with fixed "overhead, and other institutional costs." [11]

By April of 1970, the language of the Senate bill had been refined to provide that the rates for each class must be based on "the amount of operating costs, overhead, and other institutional costs of the [Postal Service] properly attributable to each class of mail based on and in proportion to *its overall effect upon the postal system.*" S. 3613, 91st Cong., 2d Sess., § 3703(c)(3), Committee Print No. 4 (March 30, 1970) (emphasis added). Clearly, in revising its bill, the Senate went beyond the narrow concept of proportionate variability to focus instead on the effect on the entire postal system of providing service to a class of mail.

The original Senate bill, S. 3613, was replaced by S. 3842. The original version of S. 3842 contained essentially the same costing language as S. 3613. *See* S. 3842, 91st Cong., 2d Sess., § 3703(c)(3) (May 14, 1970). A later version of S. 3842 provided for postal rates to be based on "operating costs, the amount of overhead, and other institutional costs of the Postal Service *properly assignable* to

---

11. Again, the term "institutional costs" had its origin in the Kappel Report. The Kappel Commission used the term to refer to fixed costs that do not vary, even over the long term, with changes in the volume of a class of mail. *See, e.g.*, Kappel Report at 62 (referring to costs that "are essentially fixed or institutional").

each class of mail or type of mail service."[12] S. 3842, 91st Cong., 2d Sess., § 3704(g)(3) (June 3, 1970). When the Senate passed H. R. 17070, it substituted this language for the language of H. R. 17070 as passed by the House. 116 Cong. Rec. 22314, 22315, 22344, 22346 (June 30, 1970).

The evolution of the Senate bill makes it crystal clear that the Senate never intended the costing process to be limited to short-run variable costs. Indeed, the costing provision of the Senate bill not only went beyond short-run variable costs, but it did not stop even with long-run variable costs. Rather, the costing provision of the Senate bill explicitly referred to "overhead" and "other institutional" (*i.e.*, fixed) costs "properly attributable" to each class of mail. In short, under the Senate bill, the rate for each class was to recover *all* costs that are "properly attributable" to the class. Even fixed ("institutional") costs may be allocated to an individual class on a costing basis, as long as those costs are "properly attributable" to the class.

Since not all overhead or institutional costs could ever be allocated on a costing basis, the Senate bill contained other ratemaking factors. Even under the statutory requirement that postal rates be based on costing principles to the extent possible, there will always be, as in this case, a meaningful area in which discretion in setting postal rates under § 3622(b) will certainly be required. However, the Senate clearly intended the costing process to reach *all* costs "attributable to"—caused by, or incurred as a consequence of—the various classes of mail, whether variable operating costs or fixed overhead and "other institutional" costs.

When it met to resolve the differences between the confusing and possibly restrictive demonstrably related cost language of the House bill and the broader attributable cost language of the Senate bill, the Conference Com-

12. See page 37, *infra*, concerning the significance of the use of the term "assignable" rather than the term "attributable," which had been used in the earlier versions of the Senate bill.

mittee consciously rejected the demonstrably related costing language of the House bill and adopted instead the "direct and indirect postal costs attributable to [each] class" language found in § 3622(b)(3) of the Act. In short, the Conference Committee accepted the language of the Senate's costing provision, with a refinement apparently first proposed in conference that strengthened the provision and made it clear that it was a "requirement," not just another factor that must be considered but is not necessarily controlling.

Section 3622(b)(3) of the Act obviously parallels the Senate bill and uses both of the Senate's costing phrases—"attributable" and "assignable"—that were part of the costing language of the Senate bills, S. 3613 and S. 3842, but did not appear in the House bill. *Compare* 39 U. S. C. § 3622(b)(3) *with* S. 3613, 91st Cong., 2d Sess., §3703(c)(3), Committee Print No. 4 (March 30, 1970), S. 3842, 91st Cong., 2d Sess., § 3704(g)(3) (June 3, 1970), and H. R. 17070, 91st Cong., 2d Sess., § 1201(c) (1970). Thus, the Senate's approach clearly prevailed in the Conference Committee over the approach of the House. And in fact, the Managers for the House explicitly acknowledged as much in their statement to the House when they presented the Conference Committee's bill to the House. *Statement of the Managers on the Part of the House on H. R. 17070,* H. R. Rep. No. 1363, 91st Cong., 2d Sess. (1970), reprinted in 1970 U. S. Code, Cong. & Ad. News 3712, 3720 ("The conference substitute adopts the Senate [ratemaking] provision") (the "House Managers' Statement").

The Second Circuit stated that the D. C. Circuit's interpretation is contrary to "the consistent interpretation accorded to section 3622(b) by the [Commission and the Postal Service] in the first three ratemaking proceedings." 663 F. 2d at 1196, 18a (footnote omitted.) However, the D. C. Circuit and the Commission have always agreed that short-run variable costing does not result in the

required attribution of all attributable costs.[13] Before the D. C. Circuit decided *NAGCP-I* in 1976, the Commission itself, in the first general rate case conducted under the Act, explicitly rejected the argument that the statutory requirement of attribution is limited to short-run variable costs (J. A. 297a, 303a, 313a). Instead, the Commission stated that "the statute—far from requiring any particular method—actually envisions consideration of *all* appropriate costing approaches." *Opinion and Recommended Decision*, PRC Docket No. R71-1, at 46, quoted at J. A. 297a (emphasis added). Even when it later retreated somewhat from the view that "all appropriate costing approaches" should be used to determine attributable costs, the Commission again explicitly rejected short-run variable costs as the measure of attributable costs and instead "adopted the long-run variable cost approach to attributions that the examiner had recommended in his initial decision in [the

---

13. By contrast, the Commission and the Postal Service agreed with each other and disagreed with the D. C. Circuit concerning the purpose of the "reasonably assignable" language of § 3622(b)(3). The D. C. Circuit held that the "costs . . . reasonably assignable to [each] class" of mail language found in the § 3622(b)(3) costing provision requires that those unattributed costs that may be allocated on some reasonable costing basis must be so allocated, with the remaining costs allocated on the other, more subjective factors of the Act. See pages 8-9, *supra*. The Commission and the Postal Service, on the other hand, have interpreted the "reasonably assignable" clause so as to incorporate into § 3622(b)(3) the other factors of the Act. See pages 6-8, 18, *supra*. To the degree that the Commission, despite its adoption of a long-run costing standard, had reached results that were inconsistent with the plain language of the statute and its legislative purpose, the D. C. Circuit acted well within its proper judicial role in not blindly deferring to the Commission as to the proper construction of § 3622(b)(3). *Southeastern Community College v. Davis*, 442 U. S. 397, 411 (1979); *Espinoza v. Farah Manufacturing Co.*, 414 U. S. 86, 94-95 (1973); *NLRB v. Brown*, 380 U. S. 278, 291-92 (1965).

first rate case]" (J. A. 316a). Although the Postal Service had argued in the first two cases before the Commission that the Act permitted attribution to stop with short-run variable costs, the Commission from the first rejected the Postal Service's position.

To the extent deference may be owed to any agency in the interpretation of the ratemaking provisions of the Act, the interpretation of the Commission, not that of the Postal Service, should be accorded deference, since the Commission is charged with the primary obligation of administering the ratemaking provisions of the Act. *United Parcel Service, Inc. v. United States Postal Service*, 604 F. 2d 1370, 1381 (3d Cir. 1979), *cert. denied*, 446 U. S. 957 (1980). Indeed, it would be anomalous to defer to the interpretation of the Postal Service, an interested party, concerning the ratemaking provisions of the Act, which were designed to limit the Postal Service's discretionary authority to set postal rates.[14]

Furthermore, as the D. C. Circuit understood, this issue is a matter of statutory interpretation, where "the courts are the final authorities." *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U. S. 261, 272 (1968). This is especially so where involved are administrative decisions that the courts "deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U. S. 278, 291 (1965). See also *SEC v. Sloan*, 436 U. S. 103, 117-19 (1978).

---

14. Remarkably, in this proceeding the Postal Service took the position before the Postal Rate Commission that "The Kappel Commission recommended that the Postal Service determine for each class of mail the long-run variable costs . . . ," that "Both the original House and Senate bill endorsed the Kappel Commission approach . . . ," and that "The Congress thus adopted and implemented the concepts of variable costs . . . advocated by the Kappel Commission." Memorandum of the United States Postal Service dated May 19, 1980, at 17, J. A. 265a. Apparently forgetting the position it had asserted before the Commission, the Postal Service

Clearly, the Second Circuit erred when it rejected the interpretation of § 3622(b)(3) announced by the D. C. Circuit and adopted instead the restrictive, short-run variable costing approach championed by the Postal Service but repeatedly rejected by the Commission and the D. C. Circuit.

3. The Second Circuit Based Its Limitation of Attributable Costs to Short-Run Variable Costs on a Mistaken Understanding of the Act's Legislative History.

The Second Circuit reached its result by placing heavy reliance on only one part of one sentence found in the House Managers' Statement referring to costs "that vary over the short term in response to changes in volume." House Managers' Statement, 1970 U. S. Code, Cong. & Ad. News at 3720. The Second Circuit considered this language dispositive because of its incorrect belief that the quoted language is part of the "Conference Committee report." *See, e.g., Newsweek,* 663 F. 2d at 1199-1200, 24a-27a. However, that phrase is not a part of the Conference Committee Report and, at least when taken alone as a description of the scope of § 3622(b)(3), expresses a position that was rejected by the Conference Committee.[15]

---

14. (Cont'd.)

in its brief in the Second Circuit reverted to its earlier contention that short-run costs are the proper measure of attributable costs. At the very least, these shifts of position demonstrate why the Postal Service's views are not entitled to any deference.

15. The House Managers' Statement also treated as part of attributable costs those costs that, "even though fixed rather than variable, are the consequence of providing the specific service involved." House Managers' Statement, 1970 U. S. Code, Cong. & Ad. News at 3720. In this connection, the Commission has to date not gone beyond the Postal Service's concept of "specific fixed costs," under which those fixed costs that are unique to only one class or subclass of mail are attributed to that class. "Specific fixed costs"

Even assuming *arguendo* that the House Managers' Statement supports the Second Circuit's short-run variable costing interpretation, that Statement is contrary to every other aspect of the legislative history and is an unreliable indication of congressional intent. Statements made by members of one house that are not agreed to or considered by the other house are not determinative of congressional intent. *Vaughn v. Rosen,* 523 F. 2d 1136, 1142-43 (D. C. Cir. 1975); *Soucie v. David,* 448 F. 2d 1067, 1077 n. 39 (D. C. Cir. 1971); *Davidson v. Gardner,* 370 F. 2d 803, 828 (6th Cir. 1966). The House Managers' Statement was never put before the Senate (J. A. 305a, 322a). Instead, the Conference Committee Report as submitted to the Senate contained only the text of the Conference Committee's substituted bill, with no comments thereon. Journal of the Senate, 91st Cong., 2d Sess. 719-46 (1970). The Senate had already adopted the Conference Committee Report on August 3, 1970 (116 Cong. Rec. 26966) before the House Managers' Statement was printed for the first time and then submitted to the House along with the Conference Committee report (J. A. 305a). *See* Journal of the House, 91st Cong., 2d Sess. 915 (1970). The House did not consider the House Managers' Statement and vote on the Conference Committee's bill until after the Senate had acted. 116 Cong. Rec. 27609-10 (August 6, 1970).[16]

---

15. (Cont'd.)

are "almost insignificant" in amount, *NAGCP-I,* 569 F. 2d at 581 n. 32, comprising less than ½% of total postal costs (J. A. 295a). There is no basis either in the language of the Act or in its legislative history for restricting the attribution of fixed costs to those fixed costs that are the consequence of providing only *one* specific service, such as registered mail, but not attributing those fixed costs that are the consequence of providing two or more services.

16. Significantly, shortly after the Postal Reorganization Act was passed, Congress condemned the unilateral preparation and use of post-conference statements by the conferees of one house by requiring through specific legislation that an identical explanatory

The Second Circuit's exclusive reliance on one phrase from the unilateral statement of the House Managers is especially erroneous because the statement in question was made by members of the body that did not prevail in the Conference Committee on the costing issue. The House Managers themselves explicitly acknowledged that "[t]he conference substitute [bill] adopts the Senate provision" concerning ratemaking (House Managers' Statement, 1970 U. S. Code, Cong. & Ad. News at 3720), rather than the demonstrably related costs provision of the House bill. Clearly, when a bill is revised in Conference Committee, the views of those whose language was not accepted cannot control the interpretation of the version adopted.[17] *Hardin v. Kentucky Utilities Co.*, 390 U. S. 1, 11 (1968); *Southern Pacific Transportation Co. v. Usery*, 539 F. 2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U. S. 874 (1977); *American Smelting & Refining Co. v. Occupational Safety & Health Review Commission*, 501 F. 2d 504, 509-11 (8th Cir. 1974).

---

16. (Cont'd.)

statement, jointly prepared by the Senate and the House conferees, accompany Conference Committee reports in both the Senate and the House. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 125, 84 Stat. 1140, 1159-60 (repealed 1979), reprinted in 1970 U. S. Code, Cong. & Ad. News 1332, 1354-55 (9d-11d). *See also* H. R. Rep. No. 1215, 91st Cong., 2d Sess. (1970), reprinted in 1970 U. S. Code, Cong. & Ad. News 4417, 4492-95. That same principle has applied ever since and is now found in the rules of both houses of Congress. Rule XXVIII.4, Standing Rules of the Senate; Rule XXVIII(1)(c), Rules of the House of Representatives. See 125 Cong. Rec. S16597 (daily ed., Nov. 14, 1979).

17. For this same reason, Congressman Udall's remarks repeating the language of the House Managers' Statement, 116 Cong. Rec. 27606 (August 6, 1970), remarks that were made on the floor of the House three days after the Senate had passed the Act, cannot be accorded any weight. *See Consumer Product Safety Commission v. GTE Sylvania*, 447 U. S. 102, 118 (1980).

Finally, the Second Circuit's conclusion is contrary to the well-established canon of statutory construction that a change in the language of a bill in favor of quite different language constitutes a rejection of the changed language. *See, e.g., Southern Pacific Transportation Co. v. Usery, supra,* 539 F. 2d at 391. The substitution of the Senate's attributable costs language for the demonstrably related costs language of the House bill unquestionably represents a rejection by the Congress of demonstrably related costs.

In these circumstances, the determination by the Second Circuit that Congress nevertheless adopted the House's costing approach is obviously erroneous.

C. The Act Requires That Some Portion of Unattributed Costs Be Reasonably Assigned on a Costing Basis Before the More Discretionary Factors of the Act Are Applied.

The Second Circuit also disagreed with the D. C. Circuit's holding that, after all attributable costs have been attributed, the Commission must then assign that portion of the remaining, unattributed costs that may be reasonably assigned on a costing basis. Instead, the Second Circuit held that the "costs . . . reasonably assignable to [each] class" language of § 3622(b)(3) is the operative provision through which the other seven specific factors are brought into play in postal ratemaking. *Newsweek,* 663 F. 2d at 1201, 1202, 27a-28a, 31a. Again, the rejection by the Second Circuit of the D. C. Circuit's interpretation is not only contrary to the underlying purpose of the Act, but also conflicts with the language and legislative history of the Act.

The Second Circuit's interpretation in effect rewrites § 3622(b) of the Act. If Congress had intended the "costs . . . reasonably assignable" to each class phrase in § 3622(b)(3) to encompass all of the other factors of the Act, it surely would have preceded the list of factors in § 3622(b) with this type of provision:

> "(b) Upon receiving a request, the Commission shall make a recommended decision . . . in accordance with the policies of this title and the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type *plus that portion of all other costs of the Postal Service reasonably assignable to such class on the basis of the following factors . . . .*"

But the "reasonably assignable" language was made part of § 3622(b)(3), which delineates the Act's costing requirement. Moreover, the final Senate bill had used the phrase "properly assignable" in defining the costing factor. S. 3842, 91st Cong., 2d Sess., § 3704(g)(3) (June 3, 1970). Since the operative language was derived from the Senate's costing provision, the concept of a reasonable assignment of costs obviously was directly linked with costing allocations of postal costs.

The "reasonably assignable" language must refer to the assignment of costs on a costing basis rather than on the basis of the other factors of § 3622(b). The language of § 3622(b)(3) clearly contemplates that some costs will be left over after the "reasonable assignment" process is completed. That is inherent in the requirement that only "reasonable" assignments be made; but more important, § 3622(b)(3) states that each class must bear "*that portion* of all other costs . . . reasonably assignable" to the class. To use the words of the House Managers' Statement, so heavily relied on by the Second Circuit, once all attributable costs have been attributed, ". . . the conference substitute provides for a judgmental assignment of *some* part of the remaining costs." House Managers' Statement, 1970 U. S. Code, Cong. & Ad. News at 3720 (emphasis added). If this assignment of "some" part of the remaining costs were intended to be on the basis of the non-cost factors specifically listed in § 3622(b), then there would be no provision in the Act governing the allocation of the other part of postal costs remaining after "some" part of the unattributed costs were assigned.

Contrary to the incorrect assumption of the Second Circuit (663 F. 2d at 1198, 21a), the D. C. Circuit's interpretation leaves ample room for the Commission to consider and implement the non-cost factors of the Act. In the proceeding on review here, the Commission attributed and assigned on a cost-of-service basis just under 74% of all postal costs, leaving more than 26% of total postal costs to be allocated on the basis of the non-cost factors of § 3622(b) (J. A. 295a). In other words, the Commission had available almost *$6 billion* (J. A. 295a) to allocate on the basis of the more discretionary factors listed in subsections (1)-(2) and (4)-(9) of § 3622(b).

III. Congress Has Endorsed the District of Columbia Circuit's Interpretation of the Act.

That the D. C. Circuit in *NAGCP-I* correctly ascertained the congressional intent on the costing issue has been confirmed by Congress, which has not adopted legislative proposals introduced with the specific purpose of overturning that interpretation.

Even before the D. C. Circuit issued its *NAGCP-I* opinion, efforts were initiated to have Congress reject the earlier unanimous concurring opinion of that court in the *American Publishers* case, which foreshadowed the decision in *NAGCP-I*. Responding to attacks on the *American Publishers* concurring opinion, Congress in § 7 of the Postal Reorganization Act Amendments of 1976,[18] established a five-member Commission on Postal Service (3d-8d). In § 7(b)(3)(C) of that act, Congress specifically instructed the Commission on Postal Service to study the ratemaking provisions of the Act. 90 Stat. 1308 (5d). Following the decision in *NAGCP-I* on December 28, 1976, that Commission also studied the *NAGCP-I* decision in complying with its mandate to determine whether the ratemaking provisions of the Act needed legislative attention.

The Commission on Postal Service issued its report in April 1977, approximately four months after *NAGCP-I*

18. Pub. L. No. 94-421, 90 Stat. 1303, 1307-10. Section 7 was not codified as part of 39 U. S. C.

was decided. In its report, that Commission specifically recommended legislation to overrule *NAGCP-I* and limit the costs that could be attributed to the various classes of mail on a cost-of-service basis to no more than 60% of total postal costs. 1 *Report of the Commission on Postal Service,* at 63, 64 (April, 1977). The proposal to overturn *NAGCP-I* by limiting attributable costs was subsequently incorporated in S. 3229, 95th Cong., 2d Sess., § 6(a) (1978), and H. R. 7700, 95th Cong., 2d Sess., § 2(b) (1978). It was discussed before Congressional committees and debated in Congress. *See, e.g., Postal Service Amendments of 1978: Hearings Before the Subcommittee on Energy, Nuclear Proliferation, and Federal Services on S. 3229 and H. R. 7700,* 95th Cong., 2d Sess. 608, 625-26 (1978); 123 Cong. Rec. 36665, 36666 (November 2, 1977). Nevertheless, despite the recommendation of the Commission on Postal Service, Congress did not amend the Act, pass any of this legislation, or take any other action to overrule or limit *NAGCP-I.*

The only inference that may be drawn from Congress' refusal to adopt legislation proposed for the specific purpose of overruling *NAGCP-I* is that Congress endorses the D. C. Circuit's interpretation of the Act. *See, e.g., Blau v. Lehman,* 368 U. S. 403, 412-13 (1962); *Kay v. FCC,* 443 F. 2d 638, 646-47 (D. C. Cir. 1970). Thus, the Second Circuit's decision disagreeing with the D. C. Circuit is squarely contrary to the considered action of Congress in refusing to overturn *NAGCP-I* by legislative means.

IV. The Holding of the Second Circuit Is Contrary to Principles of Sound Public Policy Embodied in the Act.

A. Proper Costing Is Essential to Prevent Cross-Subsidization and Undue Discrimination Among the Classes of Mail.

Cross-subsidization and undue discrimination exist when the revenues from one service are less than the costs of providing that service, and the difference between costs and revenues is made up by revenues derived from another

service. *See Continental Air Lines, Inc. v. CAB*, 551 F. 2d 1293, 1297 (D. C. Cir. 1977) (affirming fares based upon the CAB's conclusion that "unless fares of the different classes reflect the cost of providing the respective services, there will be a subsidy between classes in the long run"); *Payne v. Washington Metropolitan Area Transit Commission*, 415 F. 2d 901, 915 n. 71 (D. C. Cir. 1968) ("the cost element is at the heart of the concept of price discrimination"). Thus, the rates for each class of mail must recover at least all of the costs caused by the class if the objective of Congress to prevent rate discrimination and cross-subsidization is to be achieved. *See* 39 U. S. C. § 403(c). The requirement that rates be based primarily on a cost-of-service basis is especially important where, as in the case of the Postal Service, the regulated enterprise competes in some markets and is protected from competition in other markets.[19]

The Second Circuit would appear to have been unconcerned with the danger of cross-subsidy of competitive

19. In *United States v. United States Postal Service*, No. 81-3206 (D. D. C., dismissed for lack of jurisdiction December 31, 1981), and *In Re United States of America*, No. 81-2402 (D. C. Cir., dismissed for lack of jurisdiction April 20, 1982), the United States, through the Antitrust Division of the Department of Justice, sought to enjoin the Postal Service from instituting a new Electronic Computer Originated Mail service ("E-COM"), *see Governors of the United States Postal Service v. Postal Rate Commission*, 654 F. 2d 108 (D. C. Cir. 1981), on the ground that

> "E-COM would permit the Postal Service, an agency having a substantial government subsidy (about $900 million for fiscal 1981) and a monopoly over letters, to compete with private sector firms . . . now providing, or with the capability of providing, a similar service. This would be done . . . without any showing by the Postal Service that its proposed rate is high enough to pay even its direct costs. It is thus likely . . . that E-COM would be subsidized and would preempt private sector activity."

Emergency Motion of the United States for a Stay Pending Ruling on Petition for an Extraordinary Writ, filed December 31, 1981,

services by monopoly services, or at least to have disregarded it.[20] This danger is real. For example, in the present proceeding the Commission rejected the Postal Service's requested 20¢ rate for first class letter mail and instead recommended a rate of 18¢ in order to rebuff the Postal Service's effort to saddle first class mail users with a disproportionate burden of unattributed and unassigned costs.[21]

Insisting on rates for each class of mail that recover all costs caused by that class not only protects against cross-subsidization, but also has other sound economic justifications. Ratemaking founded on that principle promotes the efficient allocation of resources and encourages sound investment decisions. On the other hand, low rates based on short-run costs encourage consumers to push

19. (Cont'd.)

in *In Re United States of America*, No. 81-2402 (D. C. Cir.), at 4 n. 3. The Department of Commerce and the Department of Justice had both intervened in the administrative proceeding before the Commission to guard against the possibility that revenues from first class monopoly mail might be used to subsidize the competitive E-COM service.

20. Indeed, the Second Circuit seemed disturbed that "at the [Commission] hearings UPS requested that parcel post rates be increased by a staggering 22%," *Newsweek*, 663 F. 2d at 1208 n. 18, 42a, but it made no such comment concerning the Governors' attempt to recover almost the entire $1 billion of revenues originally disallowed by the Commission by implementing the Postal Service's requested increase of 33 1/3% for the monopoly first class mail service. *Newsweek*, 663 F. 2d at 1203 n. 14, 32a.

21. The Governors later modified the Commission's recommended rates, purportedly pursuant to 39 U. S. C. § 3625(d), and imposed the 20¢ rate on first class mail users. See page 5 n. 3, *supra*. The two-cent increase in the first class letter rate produces an additional $987 million in postal revenues annually from that class (R. 31106). The Governors' action has been appealed to the Second Circuit. *Time, Inc. v. United States Postal Service*, Nos. 81-4183 *et al.* (argued April 21, 1982).

demand upward for the low-priced classes, and thereby cause uneconomic investments and inefficient employment of resources in order to support the higher demand. J. Bonbright, *Principles of Public Utility Rates,* at 334-36 (1961).

Accordingly, when, as the D. C. Circuit has ruled, the rate floor for a service includes all costs caused by the service, optimal investment is encouraged, and undue discrimination and cross-subsidization are prevented.

B. Short-Run Costing Would Permit the Cost Burden of One Class of Mail to Be Shifted Unfairly to Another Class.

As we have shown, in the first postal rate case the Commission, because of a lack of any alternative, used the Postal Service's short-run costing methodology to attribute costs. Under that approach, the Commission there attributed 50% of total postal costs (J. A. 239a, 241a-42a). In the present case, the Commission attributed 64% of total postal costs by using a long-run variable costing approach, and found another 10% of total costs to be reasonably assignable on a cost-of-service basis (J. A. 295a). However, it also found that short-run variable costs were 51% of total postal costs (J. A. 294a-95a). Thus, if attributable costs were limited to short-run variable costs rather than including all costs that are a consequence of providing service to each class of mail and no portion of unattributed costs was reasonably assigned on a costing basis, the cost floor for each class of mail would be significantly lower, leading almost certainly to discrimination against first class mail users and unfair competition with private enterprise providers of competitive services.

That short-run variable costs do not measure the cost consequences of the classes of mail is clear, as the Commission has found. For example, as determined by the Postal Service and the Commission, building occupancy costs are not short-run variable costs but the Commission has found such costs to be longer-run variable costs at-

tributable on the basis of the space utilized by the various classes of mail (J. A. 327a-38a). Similarly, none of the depreciation expense for postal buildings, mail processing equipment, and carrier vehicles is considered a short-run variable cost, but such expense is a longer-run cost and is attributed to the classes of mail (J. A. 343a-45a). Significantly, the Commission found $650 million of attributable longer-run variable costs in just these two types of costs (J. A. 336a-38a, 343a-45a). In total, almost $3 billion of costs were determined by the Commission to be variable over the long term but not over the short term (J. A. 294a-95a), or 13% of the revenue requirement of the Postal Service. Those costs would not be attributed under the standard of attribution decreed by the Second Circuit. The failure to attribute these longer-run variable costs to the classes of mail that cause them would increase the opportunity for the type of rate discrimination against users of first class monopoly mail and the resulting cross-subsidy of competitive classes of mail that Congress intended to prohibit.

By holding that a short-run costing method would satisfy the attributable cost requirement of § 3622(b)(3), the Second Circuit blinded itself to the Commission's long-run view of attributable costs. It also ignored the Commission's steadily improving ability to identify attributable costs in the postal system:

ATTRIBUTABLE COSTS
AS DETERMINED BY THE COMMISSION

Commission Docket No.	*Percent Attributable Costs to Total Costs*
R71-1	50.00% (J. A. 239a)
R74-1	52.50% (R. 31681)
R76-1	60.40% (R. 31681)
R77-1	64.96%* (R. 31681)

* 74.54 % including attributable costs and reasonably assignable costs (R. 30975)

In the present case (Commission Docket No. R80-1), the Commission determined that 64% of total postal costs are attributable to the classes of mail (J. A. 294a-95a). The Commission also determined that an additional 10% of total postal costs could be associated with certain classes of mail on a cost-of-service basis (J. A. 294a-95a) and it allocated these costs as "reasonably assignable costs" to those classes. Thus, as in Docket R77-1, the Commission concluded that approximately 74% of all postal costs could be associated with the individual classes of mail on a cost-of-service basis (J. A. 294a-95a).

Accordingly, after attributing and assigning 74% of the total costs, the Commission had left for discretionary allocation, using the other factors of § 3622(b), over 26% of total postal costs. With a budget of over $22 billion, there thus remained approximately $6 billion of costs under the Commission's analysis for the judgmental application of the pricing factors of § 3622(b). However, if attributable costs are restricted to short-run variable costs as the Second Circuit would allow, attributable costs would here be only 51% of total costs and there would remain 49% of total costs (or nearly $11 billion) subject to discretionary allocation.

If a short-run variable costing methodology were to be adopted as the determinant of attributable costs, the cost accountability of individual classes would become increasingly meaningless in the setting of postal rates. The steady progress the Commission is making toward achieving the costing standard envisaged by Congress would end.

C. The Costing Standard Adopted by the Second Circuit Would Permit the Postal Service to Compete Unfairly Against UPS and Other Private Enterprise Firms.

United Parcel Service provides its parcel delivery service for all types of shippers, both individuals and

businesses, as a regulated common carrier operating throughout the 48 continental states, the District of Columbia, on Oahu, Hawaii, and in Anchorage, Alaska (J. A. 245a-46a). While parcel post service is the principal competitor of UPS, UPS also delivers packages containing commodities handled in other subclasses of mail, such as books, records, films, and catalogs (J. A. 248a). In 1979, the Postal Service and UPS each handled more than one billion packages (J. A. 249a, 254a).

In this proceeding, the Postal Service presented rate proposals that would have resulted in a clear cross-subsidy from first class mail to competitive classes such as parcel post. To accomplish this result, the Postal Service proposed that only 59% of total costs be attributed and assigned (J. A. 244a), even though the Commission had attributed and assigned 75% of total costs in the prior rate proceeding (J. A. 238a). Thus, the Postal Service sought to lower the cost floor and increase the amount of remaining costs subject to discretionary allocation from 25% to 41% of total costs, thereby establishing a pool of residual costs for discretionary allocation of approximately $9 billion. In addition, the Postal Service proposed that the rate for the first ounce of first class monopoly letter mail be increased by 33⅓%, while parcel post rates would have been increased by only 8.3% (J. A. 41a, 44a, 46a). In fact, the percentage rate increase for first class mail (33%) would have been almost double the average increase (17%) for all other classes of mail combined (J. A. 54a-56a).[22]

For other subclasses of mail where the Postal Service handles parcels in competition with carriers such as UPS, the Postal Service proposed no rate increase whatever for "bound printed matter" (generally catalogs) and only a

22. As we have noted (page 5, n. 3, *supra*), the Governors of the Postal Service did finally impose the 33⅓% increase for the first ounce of first class mail originally requested by the Postal Service.

nominal increase of 0.6% for special rate fourth class mail (principally books and sound recordings) (J. A. 46a). Thus, the Postal Service's proposed rate increases for all parcels in fourth class mail, where it competes with private enterprise, ranged from 0% to 8%, compared to the proposed increase of 33% for first class letter mail, where it has a statutory monopoly.

Since passage of the Act in 1970, first class mail rates have been increased significantly more than parcel post rates. Under the rate increases proposed by the Postal Service in this case and now made effective, first class rates have, from 1970 to 1981, been increased by 233% (J. A. 250a). The Postal Service's proposed 8.3% rate increase for parcel post would have increased parcel post rates by only 86% over that same period (J. A. 250a). The Consumer Price Index in that period increased by 135% (J. A. 250a). Even under the 13.3% increase for parcel post adopted by the Governors on the recommendation of the Commission (R. 31359), increases in parcel post rates continue to lag far behind those of first class mail and the Consumer Price Index, while first class mail rate increases have considerably exceeded the Consumer Price Index.

The imposition on first class mail of rate increases far in excess of those for a competitive class such as parcel post illustrates that an even greater danger of discrimination, cross-subsidization, and unfair competition would exist under a costing system that permits each postal service to cover only its short-run variable costs. Over time, a still larger share of costs would be thrust on first class mail users, and users of competitive classes would bear an even smaller proportionate share of costs, with the rates of competitive classes of mail depressed far below fair levels. In such a situation, the competitive position of carriers such as UPS would become intolerable.

CONCLUSION

For the foregoing reasons, Petitioner United Parcel Service of America, Inc. respectfully requests the Court to reverse the decision of the United States Court of Appeals for the Second Circuit and remand this case for further consideration in light of the Court's opinion.

Respectfully submitted,

BERNARD G. SEGAL
ROBERT L. KENDALL, JR.
JOHN E. MCKEEVER
Attorneys for Petitioner United Parcel Service of America, Inc.

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
(215) 988-2000

Of Counsel.

Dated: July 2, 1982.

Respondent's Brief

1

Office - Supreme Court, U.S.
FILED
SEP 7 1982
STEVAS,
CLERK

Nos. 81-1304 and 81-1381

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

UNITED PARCEL SERVICE OF AMERICA, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

LOUIS A. COX
General Counsel

FRANCES G. BECK
Associate General Counsel
United States Postal Service
Washington, D.C. 20260

QUESTION PRESENTED

Whether the Postal Reorganization Act of 1970, 39 U.S.C. 3622(b), requires that postal rates and fees be fixed according to cost-of-service principles to the maximum extent possible.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement	2
Summary of argument	12
Argument:	
I. The plain language of Section 3622(b) shows that Congress envisioned a two-tier ratemaking process, with a wide area of discretion left to the Commission	15
II. The legislative history of the Postal Reorganization Act shows that Congress intended a rate floor of costs that varied with volume and a judgmental assignment of institutional costs	20
A. The Kappel Commission Report and the Foster Associates study urged the adoption of a "variable cost" rate floor and the assignment of institutional costs according to "value of service"	21
B. The House adopted the recommendations of the Kappel Commission	27
C. The Senate adopted the same approach as the House, though with less emphasis on cost allocation	31
D. The Conference adopted the House's requirement of demonstrably related costs and the Senate's discretionary criteria for assignment of institutional costs	35

Argument—Continued Page

E. Congressional action since adoption of the Postal Reorganization Act demonstrates approval of the position reached by the court of appeals in this case 42

III. Congress did not direct the attribution of service-related costs to preferential classes of mail.. 44

Conclusion 50

TABLE OF AUTHORITIES

Cases:

Association of American Publishers, Inc. v. *Governors of USPS*, 485 F.2d 768 ..... 8, 11, 42
Atlantic Seaboard Corp., 11 F.P.C. 43 25
Baltimore & Ohio R.R. v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 25
Benson v. *GSA*, 289 F.Supp. 590, aff'd, 415 F.2d 878 41
Colorado Interstate Gas Co. v. *FPC*, 324 U.S. 581.. 25
D.C. Federation of Civil Associations, Inc. v. *Volpe*, 434 F.2d 436 41
Department of the Air Force v. *Rose*, 435 U.S. 352 41
FEA v. *Algonquin SNG, Inc.*, 426 U.S. 548 39
Mississippi River Fuel Corp., 4 F.P.C. 340 25
North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982) 39
Payne v. *Washington Metropolitan Area ~~Tronist~~ Transit Commission*, 415 F.2d 901 25
Permian Basin Area Rate Cases, 390 U.S. 747..... 25
Power Reactor Co. v. *Electricians*, 367 U.S. 396.... 20
Soucie v. *David*, 448 F.2d 1067 41
Time, Inc. v. *USPS*, Nos. 81-4183, *et al.* (2d Cir. July 9, 1982) 11, 12, 45
Vaughn v. *Rosen*, 523 F.2d 1136 41

Statutes:

Congressional Budget and Impoundment Control Act of 1974, 31 U.S. 1352(a) 43

Statutes—Continued — Page

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1722, 95 Stat. 759 47
Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, 90 Stat. 1303 *et seq.*:
Section 7, 90 Stat. 1307-1310 42
Section 10, 90 Stat. 1311 ..... 38, 44
Postal Reorganization Act of 1970, 39 U.S.C. 101 *et seq.* 2, 18
39 U.S.C. 101(a) 12, 17
39 U.S.C. 101(b) 17
39 U.S.C. 101(d) 17
39 U.S.C. 202 3
39 U.S.C. 601 *et seq.* 7
39 U.S.C. 3621 3
39 U.S.C. 3622 2
39 U.S.C. 3622(b) ..... *passim*
39 U.S.C. 3622(b)(1) 17, 38
39 U.S.C. 3622(b)(2) 7, 14, 17, 21, 38
39 U.S.C. 3622(b)(3) ..... *passim*
39 U.S.C. 3622(b)(4) 38
39 U.S.C. 3622(b)(5) 7, 38
39 U.S.C. 3622(b)(6) 38
39 U.S.C. 3622(b)(7) 38
39 U.S.C. 3622(b)(8) 14, 38
39 U.S.C. 3622(b)(9) 38
39 U.S.C. 3624(a) 2
39 U.S.C. 3624(d) 3
39 U.S.C. 3625 3
39 U.S.C. 3625(d) 11
39 U.S.C. 3625(e) 11
39 U.S.C. 3626 19
39 U.S.C. 3626(a)(1) 19, 42
39 U.S.C. 3628 ..... 3, 10, 11
Pub. L. No. 89-593, 80 Stat. 815 32
18 U.S.C. 1693 *et seq.* 7

Miscellaneous:

J. Bonbright, *Principles of Public Utility Rates* (1961) 22

Miscellaneous—Continued Page

116 Cong. Rec. (1970):
p. 22053 35
pp. 26953-26954 38
p. 26954 41
p. 27606 39
121 Cong. Rec. 30777-30784 (1975) 43
122 Cong. Rec. 29748 (1976) 44
124 Cong. Rec. (1978):
pp. 8857-8860 43
pp. 18451-18453 43
Exec. Order No. 11341, 3 C.F.R. 632 (1966-1970 Compilation) 21
H.R. 11750, 91st Cong., 1st Sess. (1969) 29
H.R. 17070, 91st Cong., 2d Sess. (1970) 13, 28
H.R. 7700, 95th Cong., 2d Sess. (1978) 43
H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970) 28, 32
H.R. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess. (1970) 19, 38, 39-40
Post Office Cost Ascertainment System: Hearings Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 27
Post Office Reorganization: Hearings Before the House Comm. on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 29, 31, 37-38
Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 29, 31, 32, 38
Postal Rates and Revenue and Cost Analysis: Hearings Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 13, 27, 29, 30, 37, 40
Postal Reform: Hearings on H.R. 17070 Before the House Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 29, 30

Miscellaneous—Continued Page

Postal Service Amendments of 1978: Hearings on S. 3229 and H.R. 7700 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (1978) 6, 43
Report of the Commission on Postal Service (1977) 43
S. 3613, 91st Cong., 2d Sess. (1970) 36
S. 3842, 91st Cong., 2d Sess. (1970) 34, 37
S. 3229, 95th Cong., 2d Sess. (1978) 6, 43
S. Rep. No. 91-912, 91st Cong., 2d Sess. (1970) 14, 18, 32-33, 34, 36
S. Rep. No. 95-1244, 95th Cong., 2d Sess. (1978) 43
Senate Journal, 91st Cong., 2d Sess. (Aug. 3, 1970) 37
Towards Postal Excellence: The Report of The President's Commission on Postal Organization (1968) ("Kappel Commission Report") 21, 22, 28, 29, 31, 36, 46, 47
Towards Postal Excellence: The Report of the President's Commission on Postal Organization: Annex (Contractor's Reports) Vol. II (1968) ("Foster Associates Report") 23, 24, 25, 26, 29-30, 31, 46

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1304

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

No. 81-1381

UNITED PARCEL SERVICE OF AMERICA, INC., PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES POSTAL SERVICE

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a)[1] is reported at 663 F.2d 1186. The decision of the Governors of the United States Postal Service, dated March 10, 1981 (Pet. App. 1b-140b), is not reported.

---

[1] "Pet. App." refers to the appendix to the petition in No. 81-1304.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1981. A petition for rehearing was denied on January 11, 1982. The petitions for a writ of certiorari were filed on January 12, 1982 (No. 81-1304), and January 25, 1982 (No. 81-1381), and were granted on April 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Pertinent portions of the Postal Reorganization Act of 1970, 39 U.S.C. 101 *et seq.*, are reproduced at Pet. App. 1c-17c.

STATEMENT

This action arises out of the most recent postal rate proceeding. On March 10, 1981, the Governors of the United States Postal Service allowed to take effect, under protest, a recommended decision of the Postal Rate Commission governing postal rates and fees. On petition for review, the court of appeals remanded the case for further consideration. Petitioners seek review of that judgment.

1. When Congress enacted the Postal Reorganization Act, 39 U.S.C. 101 *et seq* (the Act), in 1970, it relinquished the control it had traditionally exercised over the setting of postal rates and fees and the establishment of mail classes. Instead, it established the United States Postal Service (USPS) and the Postal Rate Commission (Commission) as agencies independent of each other, each with a role in setting rates.

Under 39 U.S.C. 3622, the Postal Service initiates a rate proceeding by requesting the Commission to recommend changes in rates or fees when "the Postal Service determines that such changes would be in the public interest." The Postal Service submits proposed rates with its request. After receiving the request, the Commission holds hearings on the proposed rates (39 U.S.C. 3624(a))

and then recommends a decision to the Governors (39 U.S.C. 3624(d)).[2] The Governors may approve a decision recommended by the Commission, allow it under protest, reject it, or (in certain circumstances) modify it (39 U.S.C. 3625). A decision by the Governors that orders new rates into effect may be appealed to any court of appeals by "an aggrieved party who appeared in the proceedings under [39 U.S.C.] 3624(a)" (39 U.S.C. 3628).

The Commission does not possess unfettered discretion in arriving at the rates it recommends to the Governors. 39 U.S.C. 3622(b) specifies nine considerations—in addition to the more general one of "the policies of [the Act]" —that must guide the Commission in recommending changes in rates and fees. These factors reflect the breadth of Congress's concerns. They include such matters as the value of service to sender and recipient; the availability of other means of communication; the effect on competing enterprises; the social, cultural, and educational value of the mail; and, of particular relevance here, "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type" (39 U.S.C. 3622(b)(3)).

2. The Postal Service's decision to initiate a rate proceeding is guided by the statutory requirement that its total income equal, as nearly as practicable, its costs. 39 U.S.C. 3621. An estimation of costs for a given future "test year" is calculated from projections for 20 "cost segments" (each subdivided into "components") that measure the various resources consumed in producing postal services. Examples include Clerks and Mailhan-

---

[2] The Act vests the direction of the Postal Service in an 11-member Board of Governors. Nine of the members, known as Governors, are appointed by the President, subject to Senate confirmation. The Governors appoint the Postmaster General, and with him choose the Deputy Postmaster General, both of whom become members of the board. 39 U.S.C. 202.

diers (segments 3 & 4), City Delivery Carriers—Street Activity (segment 7), Purchased Transportation (segment 14), Building Occupancy (segment 15), and Supplies and Services (segment 16).[3] The resulting cost projections yield a figure that revenues must cover. The rate-setting process determines how costs are to be shared among the various classes of mail defined in the Domestic Mail Classification Schedule (DMCS).[4]

To comply with the requirement of Section 3622(b)(3) that it "attribute" costs where possible to the mail classes responsible for them, the Postal Service, in suggesting rates, determines which costs are traceable to particular classes. Because "attributable * * * costs vary, at least by inference, with volume," *National Association of Greeting Card Publishers* v. *USPS*, 607 F.2d 392, 415 (D.C. Cir. 1979), cert. denied, 444 U.S. 1025 (1980) (*NAGCP III*), USPS and the Commission have studied the cost segments to determine which costs are variable. Some change directly in response to increases in the number of pieces of mail (*e.g.*, the cost of mail processing clerks (segments 3 & 4)), or the weight of mail (*e.g.*, air transportation (segment 14) is purchased on the basis of pound-miles), or the cubic dimensions of mail (*e.g.*, rail transportation (segment 14) is purchased on the basis of cubic foot-miles). Such costs are then apportioned among the various classes in accordance with the appro-

---

[3] Purchased Transportation, for example, is then broken into six components: domestic air service, contract highway service, railroad service, domestic water service, international air service, and international water service.

[4] The four general classifications in the DMCS are: First Class (basically letters, post cards, and small sealed parcels); second class (essentially newspapers, magazines, and other periodicals); third class (single piece service for small parcels, catalogs, etc.; bulk mail service for brochures, catalogs, etc. in mailings of at least 200 pieces or 50 lbs.); and fourth class (parcel post—*i.e.*, merchandise of 1 lb. or more—bound advertising matter, books, films, recordings, and library rate mail).

priate "distribution key" (number of pieces mailed, weight, distance, cubic dimensions).

Other cost variations are indirect. For example, the number—and cost—of mail processing supervisors (segment 2) varies in response to the number of clerks, and hence indirectly in response to mail volume (C.A. App., vol. V, App. J, 23).[5] The costs of general foremen (segment 2), who supervise the supervisors, in turn vary with the number of supervisors (*ibid.*).[6] Some costs, however, vary only partially or not at all with changes in volume. They are, to the extent they do not vary, fixed. Consider the analysis of cost segment 7 (City Delivery Carriers—Street Activity). USPS, after conducting several studies, divided the segment into a number of activities. These included "travel time" (time spent going from the station to the first house and from the last house back to the station), "route time" (time to traverse the route with no stops), "access time" (time spent going from the route to a house), "load time" (time spent putting mail in people's mailboxes), and "other" (mail collection, etc.). See J.A. 9a-15a.[7] Some of those activities varied imperceptibly with the volume of mail. For example, mail is collected from mailboxes on regular schedules, and the quantity of mail in the box has little effect on the time or effort it takes to do so. C.A. App., vol. V, App. J., 113. "Route time" on letter rounds is determined principally by distance and terrain. On the other hand, "access time" varies with the volume of pieces insofar as that volume affects

---

[5] "C.A. App." refers to the Joint Appendix in the court of appeals.

[6] Indirectly attributable costs in the fifth general rate proceeding (Docket No. R80-1) amounted to more than $4.5 billion, more than 20% of all accrued costs (C.A. App., vol. V, App. J).

[7] The account in text is somewhat simplified. "Load time," for example, was further divided between loading of parcels and accountables, on the one hand, and loading of batches of mail. Moreover, time spent on the various activities was calculated separately for six different types of routes. See J.A. 11a-12a.

the number of stops (*id.* at 71-79). In Docket No. R80-1, the rate proceeding underlying this case, the Commission concluded that access time for residential routes was 67.64% attributable (*id.* at 109).

In the first general rate proceeding under the Act, USPS took the position that only short-run variable costs (*i.e.*, those that varied with volume during the test year) could be attributed to specific classes of mail. The Commission, though it expressed reservations, accepted short-run cost attribution because no alternative data were available. J.A. 296a-301a. Since then USPS and the Commission have come to agree that attributable costs should include longer-run as well as short-run variable costs.[8] In its First Recommended Decision in this case the Commission concluded that, "[a]s a legal matter, there now appears to be no reason to distinguish between short-run and longer-run variable costs when analyzing cost causality." C.A. App., vol. IV, 134.

In the first three general rate proceedings USPS and the Commission also found in Section 3622(b) a two-tier process for allocating postal costs. After direct and indirect variable costs[9] were attributed in the manner just described, the second step was to assign the remaining fixed costs on the basis of the non-cost factors listed in Section 3622(b)(1)-(2), (4)-(8) (Pet. App. 12a). For example, in deciding what fraction of those remaining

---

[8] In 1978 USPS supported a proposed amendment to Section 3622(b) that would have expressly required a longer-run (three-year) approach to volume variability. See *Postal Service Amendments of 1978: Hearings on S. 3229 and H.R. 7700 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 626 (1978). Most of the legislative materials cited in this brief and in the briefs of the other parties have been lodged with the Court in the Joint Appendix of Relevant Legislative Material.

[9] In addition to variable costs, fixed costs incurred for the benefit of a single class would also be attributed. These "specific fixed costs" have constituted a relatively insignificant fraction of all costs.

costs to assign to First-Class Mail, Section 3622(b)(2) ("the value of the mail service actually provided each class * * * to both the sender and the recipient") would suggest a high cost coverage,[10] given the inelasticity of that class. Mitigating that effect is Section 3622(b)(5) ("the available alternative means of sending and receiving letters"). Because the Private Express statutes, 39 U.S.C. 601 *et seq.*; 18 U.S.C. 1693 *et seq.*, restrict alternative transmission of letters, any price increase should be moderated. Similar consideration is given to the other non-cost factors in Section 3622(b).

3. In 1976, on review of the second general rate proceeding, the District of Columbia Circuit questioned the process followed by the Postal Service and the Commission in allocating postal costs. The court held that Section 3622(b)(3) is the dominant factor to be considered in setting rates and fees and that the Act accordingly requires a three-step approach: (1) the Commission must "attribute" to each class of mail those costs that, through variability theory or through *other* inferences of causation, may reasonably be determined to result from providing the service in question; (2) the Commission must then implement the "reasonably assignable" requirement of Section 3622(b)(3) by distributing among the various mail classes and services the portion of all remaining costs that may reasonably be assigned on the basis of the best available cost-of-service estimates; and (3) finally, in allocating any other costs that are not "reasonably assignable," the Commission may consider the other factors listed in Section 3622(b). *National Association of Greeting Card Publishers* v. *USPS*, 569 F.2d 570, 589 (D.C. Cir. 1976), vacated as to the other issues, 434 U.S.

---

[10] The term "cost coverage" describes the revenues from a class of mail as a percentage of the attributed costs of that class of mail. For example, the cost coverage of First-Class Mail calculated by USPS in this proceeding was 168%. This means that revenues from First-Class Mail represented 168% of its attributed costs.

884 (1977) (*NAGCP I*).[11] The court did not say what other inferences of causation—apart from volume variability—might be used; nor did it describe with much precision the difference between costs "attributed" through such inferences and costs "assigned" on the basis of cost-of-service estimates.[12]

In response to the D.C. Circuit's direction in *NAGCP I*, the Postal Service in the fourth general rate proceeding proposed an additional step—"assigning" costs according to a concept of Service-Related Costs (SRC). SRC assumed that, were it not for the preferential service stand-

---

[11] *NAGCP I* was foreshadowed in *Association of American Publishers, Inc.* v. *Governors of USPS*, 485 F.2d 768 (D.C. Cir. 1973). The court there reviewed the first general rate proceeding and sustained the decision, though a concurring opinion by Chief Judge Bazelon expressed reservations later more fully articulated in *NAGCP I*. 485 F.2d at 776-779. An appeal from the third general rate proceeding, *National Association of Greeting Card Publishers* v. *USPS*, No. 76-1611 (D.C. Cir. June 27, 1978) (*NAGCP II*), was dismissed as moot when the Commission rendered its decision in the fourth general rate proceeding. That decision in turn, was reviewed in *NAGCP III*, *supra*.

[12] The D.C. Circuit explained "inferences of causation" and "cost of service" principles by reference to the administrative law judge's method for attributing transportation and carrier costs. *NAGCP I*, *supra*, 569 F.2d at 583-584. The ALJ selected physical measurements of output—distribution keys such as weight and cubic volume—and distributed costs to mail classes in accordance with them. When costs in fact vary with such factors, there is a causal connection that justifies their use as distribution keys. For example, the cost of providing post-office box space varies with the size of the box, so a higher fee is charged for a larger box. On the other hand, where an increase or decrease in weight, cubic volume, or number of pieces will have no corresponding effect on costs, using those factors as distribution keys is no more defensible than using the color of envelopes as a way of distributing costs.

Consider the ALJ's proposal for attributing city delivery carrier costs. He suggested that such costs should be divided on the basis of the weight and cubic volume of mail of each class. *NAGCP I*, *supra*, 569 F.2d at 583-584. If First-Class Mail constituted 17% of total mail weight and the same fraction of cubic volume, it

ards for certain categories of mail, the Postal Service would only operate on a three-day-a-week delivery schedule. The Service thus "assigned" to those preferential categories (First Class, second class, and parcels) the

---

would bear 17% of the costs in segment 7 (City Delivery Carriers—Street Activity). As the discussion above (pages 5-6) suggests, however, weight and cubic volume have only the remotest effect on foot carrier costs. The Postal Service designs routes, and hence fixes carrier costs, according to the number of possible delivery stops and a "coverage" factor (the percentage of stops made on an average day). Nor do weight and space significantly affect the carrier's work load. To begin with, parcels and other bulk mail are delivered by motorized parcel carriers. Moreover, because a relay transportation system supports the foot carrier, the fact that postal regulations permit him to carry only 35 pounds has little effect. The number of times he must return to the relay box has a relatively minor impact, compared to the number of stops he must make. The inappropriateness of using distribution keys unrelated to cost causation was perhaps most succinctly illustrated by the Commission, which pointed out that the ALJ's allocation reflected an "assumption that it will cost the Service 100 times more in labor costs to deliver the average parcel of 5.8 pounds than the average first-class letter." C.A. App., vol. V, App. B, 40. See also *id.* at 43 n.1 (motorized carrier vehicle costs vary with number of pieces, not weight and space).

In this case petitioner National Association of Greeting Card Publishers (NAGCP) has echoed the same theme (Br. 27-31). The reason undoubtedly is that First-Class Mail (the class used by mailers of greeting cards) constitutes 58% of mail pieces (Br. 29), and the use of weight and volume as distribution keys would greatly reduce the costs attributable to that class. As NAGCP's own witness testified, however, the distribution of institutional costs on the basis of accounting principles like those employed by the ALJ will not track cost causality. "[I]t almost can't even happen by accident." J.A. 193a. The witness went on to say, "I prefer using cost causality by which I mean marginal cost. But if cost causality is not or cannot be measured, then I prefer using indices like weight, number of pieces, etc., which are the essence of Fully Distributed Costs, rather than value of service pricing." *Id.* at 212a. The legislative history of the Postal Reorganization Act renders indisputable, however, that Congress consciously rejected fully-distributed-cost techniques and approved value-of-service pricing. See pages 21-28, 32-33, *infra*.

fixed costs of delivery representing the difference between this hypothetical schedule and a six-day-a-week schedule. The Commission expressed its dissatisfaction, in the fourth general rate proceeding, with the three-tier approach required by *NAGCP I* (Pet. App. 15a-16a). It nevertheless employed SRC in its recommended decision, and the D.C. Circuit approved the concept. *NAGCP III*, *supra*, 607 F.2d at 404-412.

4. This action was initiated under 39 U.S.C. 3628 by parties who had appeared in the fifth general rate proceeding before the Commission. In response to the Postal Service's request for a rate increase, the Commission held hearings and issued a recommended decision proposing a new rate schedule that included, among other features, an 18-cent First-Class stamp. On March 10, 1981, the Governors decided to allow the Commission's recommended decision to take effect under protest.[18] A number of parties appealed from that decision by the Governors. A primary issue in the appeal was the proper interpretation of Section 3622(b). Several parties argued that the rates recommended by the Commission were unlawful because they were based on the D.C. Circuit's incorrect construction of that Section. Others agreed generally with the D.C. Circuit's interpretation, but challenged SRC as an irrational way of assigning costs. The Postal Service, although it defended the Governors' decision to allow the changes to take effect under protest, argued that the D.C. Circuit's reading of Section 3622(b) was improper and rejected the SRC concept (Pet. App. 5a-6a).

The court of appeals remanded the case for reconsideration in light of the rate-setting principles it announced.

---

[18] The Postal Service had requested a 20-cent First-Class stamp and other rate changes that the Commission rejected. The Commission's recommended decision included a $1 billion reduction in USPS's proposed revenue requirements. Because of the Postal Service's need for revenue, the Governors allowed the Commission's recommendation to take effect and returned the case to the Commission for reconsideration (Pet. App. 9a-10a).

The court found nothing in the language or legislative history of the Act to "suggest[] that Congress meant to impose * * * rigid rules for rate-setting so as to leave the PRC and the Board with only minimal discretionary authority in determining how much of the postal costs a particular rate or fee was to absorb" (Pet. App. 21a). To the contrary, the court found that "the rate-setting power was committed to agency discretion, subject to *broad guidelines*, rather than specific, rigid formulae" (*id.* at 22a), and that Section 3622(b)(3) in particular is "susceptible of a variety of interpretations * * *" (*id.* at 20a, quoting *Association of American Publishers, Inc.* v. *Governors of USPS*, *supra*, 485 F.2d at 779 (Bazelon, C.J., concurring)). Accordingly, the court held that, although the Commission was free to recommend rates in accordance with the D.C. Circuit's interpretation of Section 3622(b), the Act also allowed other methods of setting rates that were not based on fully-distributed-cost techniques. Moreover, the Commission was free, if it wished, to abandon SRC as an additional step in allocating costs (Pet. App. 19a-32a, 48a).[14]

---

[14] After the petitions for review of the Governors' March 10, 1981 decision were filed, but before the court of appeals' decision, the Commission issued a Second Recommended Decision substantially reaffirming its earlier recommendation. On June 29, 1981, the Governors rejected the second recommendation. After the Commission, on September 17, 1981 again refused to alter its recommended decision, the Governors on September 29, 1981 exercised their statutory authority to modify the decision. 39 U.S.C. 3625(d). Among other changes, the Governors abandoned the SRC concept and increased the price of a First-Class stamp to 20 cents effective November 1, 1981 (see Pet. App. 10a n.4, 32a n.14).

The Governors' modification decision was appealed to the Second Circuit. In *Time, Inc.* v. *USPS*, Nos. 81-4183, *et al.* (July 9, 1982), the court held that the Governors had acted within their statutory authority in modifying the Commission's Third Recommended Decision (slip op. 3873-3879). It concluded, however, that the Governors had not complied with the duty, imposed by 39 U.S.C. 3625(d), (e), and 3628, to provide a reasoned explanation for the class-by-class modifications they made (slip op. 3884-3893). It also found

SUMMARY OF ARGUMENT

I.

The plain language of 39 U.S.C. 3622(b) shows that Congress did not require the tracing of costs to particular classes of mail to be the overmastering theme of rate-making proceedings. Section 3622(b)(3) indisputably requires that each class of mail "bear the direct and indirect postal costs attributable to that class." But the "requirement" that costs be attributed where their causes are known is only one among nine factors the Commission must consider in recommending rates. The Postal Reorganization Act states that the Commission "shall" consider those other factors, 39 U.S.C. 3622(b), and that postal costs "shall not be apportioned to impair the overall value of [postal] service to the people." 39 U.S.C. 101(a). Thus, once the Commission has allocated attributable costs, it has discretion to divide "all [the] other costs of the Postal Service" among the various classes of mail, deciding for each what is "reasonabl[e]" in light of the other statutory factors. That is the meaning of the second

---

that although the Governors might reject the Commission's choice of a costing methodology, and hence its use of SRC, they could do so only where the Commission's methodology would not produce the revenue required to meet the Service's costs (*id.* at 3895). The court thus remanded the case to the Governors, whom it "invite[d] * * * to seek from the PRC a fourth recommended decision consistent with *Newsweek*. The [Governors] may, of course stand by [their] modifications, in which case [they] will have to supply us with the class by class explanations and [their] justifications for discarding the SRC concept * * *" (*id.* at 3897-3898). The court retained jurisdiction to review, if necessary, the Governors' explanation (*id.* at 3898 n.25).

For the reasons detailed in the Postal Service's brief at the petition stage (USPS Br. 9-12), these subsequent events do not render this case moot. Although the *Time* case was decided since that brief was filed, the court of appeals retained jurisdiction over the case to review the Governors' action either in explaining the modifications made in the September 29, 1981 decision or in passing on a Fourth Recommended Decision from the Commission.

clause in Section 3622(b)(3), upon which petitioners rely. USPS and the Commission have construed the statute in this way since its enactment. Their consistent administrative construction is entitled to great deference.

II.

The language and administrative interpretation of Section 3622(b) are supported by the legislative history of the Postal Reorganization Act. The reports of the Kappel Commission and Foster Associates, which laid the conceptual foundation for the Act, severely criticized the system of fully allocated costs, which the Post Office had used since 1926. In its stead they proposed a two-step ratemaking process. To avoid undue discrimination, each mail class would be required to bear its long-run variable costs. The remainder of institutional costs—which were estimated to comprise 40-50% of total postal costs—were then to be distributed according to value-of-service principles.

That approach was adopted almost verbatim by the House, whose bill required each class of mail to bear its "demonstrably related" costs. H.R. 17070, 1st Cong., 2d Sess. § 1201(c) (1970). Demonstrably related costs were understood to mean

> [t]hose costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.

Postal Rates and Revenue and Cost Analysis: Hearings Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. 75 (1970). Above that floor, institutional costs—estimated at 50% of total costs—would be allocated according to value of service and other factors.

The Senate rejected a proposal for fully allocated costs, "on the principle that no particular cost accounting sys-

tem is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost." S. Rep. No. 91-912, 91st Cong., 2d Sess. 17 (1970). It directed that all other costs be apportioned by the Commission according to the factors now found in Section 3622(b).

The conference committee adopted the specific discretionary factors in the Senate bill. However, because the Senate bill did not mandate the attribution of incremental costs, the conferees preferred the House's version of what became Section 3622(b)(3). That interpretation of the conference's actions is evident from the final language of the provision and from explicit statements by the sponsor of the House bill, the House conferees, and the sponsor of the Senate bill.

Since passage of the Act, Congress has amended it to include still another discretionary factor—"the educational, cultural, scientific, and informational value to the recipient of the mail matter" (39 U.S.C. 3622(b)(8)). Congress has also rejected amendments to the Act that would endorse the result urged by petitioners. Its action demonstrates approval of the position reached by the court of appeals in this case.

III.

The court of appeals correctly held that the attribution of Service-Related Costs was not required by the Act and that the priority accorded preferential mail classes was a factor for the Commission to assess in setting rates and for the Governors to consider in exercising their modification power. The Act states that "priority of delivery" is one element in determining "value of * * * service." 39 U.S.C. 3622(b)(2). Like other costs apportioned according to "value of service" principles, SRC are fixed costs that confer some benefit on all mail classes, preferential and non-preferential alike. On the other hand SRC do have some elements in common with peak-load variable costs and with specific fixed costs. Given the uncertainty of such issues as causation, the value of delivery priority,

and the effect that attribution of SRC would have on revenues and interclass rate relationships, their resolution is best left to agency discretion.

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 3622(b) SHOWS THAT CONGRESS ENVISIONED A TWO-TIER RATEMAKING PROCESS, WITH A WIDE AREA OF DISCRETION LEFT TO THE COMMISSION

Petitioner United Parcel Service (UPS) argues that Section 3622(b) requires the Postal Service and the Commission to follow three steps in rate-setting: attribution of "[a]ll [c]osts [c]aused by a [c]lass of [m]ail;" assignment of "[s]ome [p]ortion of [u]nattributed [c]osts * * * on a [c]osting [b]asis;" and a discretionary distribution of the remaining costs (Br. 25, 36-38; see also NAGCP Br. 17). Both UPS and NAGCP contend that Section 3622(b) is a clear statement of Congress's intent to maximize the use of cost-of-service principles in apportioning responsibility for the Postal Service's revenue requirement among the various classes of mail (UPS Br. 21-38; NAGCP Br. 16-19). Their position mirrors that of *NAGCP I*, *supra*, 569 F.2d at 585-587, where the D.C. Circuit refashioned the ratesetting process around its self-confessed "murky distinction between 'attribution [of costs]' * * * and 'assignment [of costs],' both of which were to proceed from "inferences of causation.'" *NAGCP III*, *supra*, 607 F.2d at 406. Given the structure and the language of Section 3622(b), it is surprising that such a reading of the statute should persist.

Section 3622(b) provides:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matters at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

Petitioners suggest that the polestar that Congress fixed for the Postal Service and the Commission is to be found in subsection (b)(3). But, as the court of appeals in this case noted, "had Congress intended primary importance to attach to that factor, we think that, at the very least, it would have been placed at the top of the

list of factors" (Pet. App. 21a). Instead, it is preceded by what are evidently more general principles: "(1) the establishment * * * of a fair and equitable schedule; (2) the value of the mail service actually provided * * *." 39 U.S.C. 3622(b)(1), (2).

It is true that only subsection (b)(3) is introduced as a "requirement." But that is not the only imperative to be found in Section 3622, which begins with the direction that "the Commission *shall* make a recommended decision * * * in accordance with *the policies of this title* and *the following factors* * * *" (emphasis added). Chief among the policies referred to are those outlined in the first section of the Act, 39 U.S.C. 101(a) (emphasis added), which states that

> The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. *The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people.*

See also 39 U.S.C. 101(b), (d). Moreover, the eight factors other than attributable costs listed in Section 3622(b) "embody major principles that substantially affect the public interest and vital segments of our economy, and they should be fully reflected in the rates." *NAGCP I*, *supra*, 569 F.2d at 606 (MacKinnon, J., concurring). It is highly unlikely that Congress would have devoted such detailed attention to the factors that were to guide the Commission's discretion in recommending rates if the area within which that discretion was to be exercised was reduced to insignificance by the provision for cost attribution.[15]

---

[15] It is, if nothing else, suggestive that the Senate Report describing the operation of Section 3622(b) does not even characterize

That is not to say that the word "requirement" in Section 3622(b)(3) may be ignored. But neither the Postal Service nor the Commission has ever denied that direct and indirect costs that can be shown to be caused by a particular class of mail must be attributed to that class. Indeed, the "requirement" in subsection (b)(3) goes further. After each class of mail has been given its proper share of attributable costs the Commission must—if the Postal Service is to meet its revenue requirement—assign "all [the] other costs of the Postal Service" to the various classes, giving each responsibility for a "reasonabl[e]" portion. The decision about what is "reasonabl[e]" is to be made in light of the explicit criteria specified in the preceding and succeeding provisions of Section 3622(b). The concluding phrase of subsection (b)(3) thus states that satisfying the other rate-setting criteria is just as much a "requirement" as is the direction regarding attributable costs.

It makes little sense to find in subsection (b)(3)'s "assignment" language an inarticulate order to maximize cost-of-service allocation through inferences of causation more attenuated than those drawn in the attribution process. See *NAGCP I*, *supra*, 569 F.2d at 585-586. The words "attribute" and "assign" have no such technical meaning. The word "reasonably," by contrast, signifies that the Commission is left with discretion in satisfying this half of subsection (b)(3)'s "requirement" (see *id.* at 606 (MacKinnon, J., concurring)), a feature quite out of place if Congress intended to "curtail[] the * * * discretion" of the Commission by mandating the use of cost-of-service principles to the maximum extent possible. *Id.* at 588.

---

what later became subsection (b)(3) as a "requirement." It says rather that "the Commission is required to act in accordance with the statutory policy" in 39 U.S.C. 101, and that the "Commission must take a number of other factors into account *as well*, including, *first of all*, the establishment of a fair and equitable schedule * * *." S. Rep. No. 91-912, *supra*, at 15 (emphasis added).

The proper construction of Section 3622(b)(3)'s requirements, if the language itself were not clear enough, can be seen by comparison with 39 U.S.C. 3626. That section provides reduced rates for certain preferred classes of mail, *e.g.*, nonprofit and classroom publications. It directs that "the revenues received from rates for [such] mail * * * shall not * * * exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service)" (39 U.S.C. 3626(a)(1)). Like Section 3622(b)(3), Section 3626(a)(1) distinguishes between "attributable" costs and "all other costs." The difference is that preferred subclasses are freed from the requirement of bearing their share of the latter. Congress's intent was that the reduced rates should not "exceed postal costs for such mail excluding any portion of overhead or institutional costs." H.R. Conf. Rep. No. 91-1363, 91st Cong., 2d Sess. 86 (1970). Hence, as a comparison with Section 3626 shows, Congress envisioned in Section 3622(b)(3) a division of postal costs into two types: those that were causally related were denominated "attributable;" what remained for "assign[ment]" were "all other" ("overhead or institutional") costs.

From the passage of the Postal Reorganization Act in 1970 until the D.C. Circuit's decision in *NAGCP I*, the Postal Service and the Postal Rate Commission derived from Section 3622(b) a two-tier ratemaking process, with a wide area of discretion left to the Commission (Pet. App. 12a). Following the D.C. Circuit's decision, in the fourth general rate proceeding, the Commission stated that it did not "regard *NAGCP I* as unquestionably sound and our previous methods as incompatible with the Act. On the contrary, and with all due respect to the court, we believe that the *NAGCP I* ruling was not inevitably required by the statute and has caused us difficulties in its application" (Pet. App. 15a-16a). In its Second Recommended Decision in R80-1 the Commission, though it opined that a three-tier approach would not be prohibited by the Act, reiterated its "consistent[]

* * * position that the three-tier approach to costing, which the D.C. Circuit court found to be required by the Act, is 'not inevitably required by the statute' " (Opinion and Recommended Decision Upon Reconsideration, Docket No. R80-1 (June 4, 1981), at 69 n.2). The agencies' interpretation is consistent with the language of the Act. "[T]he administrative practice * * * 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961). It is entitled to great deference.

II. THE LEGISLATIVE HISTORY OF THE POSTAL REORGANIZATION ACT SHOWS THAT CONGRESS INTENDED A RATE FLOOR OF COSTS THAT VARIED WITH VOLUME AND A JUDGMENTAL ASSIGNMENT OF INSTITUTIONAL COSTS

The legislative history of the Postal Reorganization Act renders indisputable what is already plain from its language: Congress envisioned a two-tier rate-making process like that approved by the court of appeals. The first tier, which provided a floor for rates, was the attribution to each class of mail of the costs clearly caused by that class. These were variously described as demonstrably related, marginal, incremental, added, or variable costs, plus those fixed costs specific to a particular class. The second tier was the judgmental assignment of institutional costs according to the criteria embodied in the Act. Petitioners UPS (Br. 33) and NAGCP (Br. 27) correcly argue that the first tier of costs was intended to encompass long-run, as well as short-run, variable costs to the extent they could be measured.[16] There is absolutely no evidence, however, to

---

[16] On the other hand there is little indication in the court of appeals' opinion—apart from its mere quotation from the House Managers' Report (Pet. App. 25a, 27a)—that it believed otherwise. (For a correct interpretation of the language in the House Mana-

support petitioners' contention (UPS Br. 28-29, 36-38; NAGCP Br. 27-31; Direct Mail/Marketing Association, Inc. (DMMA) Br. 16-33) that Congress directed the attribution of costs (apart from specific fixed costs incurred by a particular class) that do not vary with volume. Finally, it is evident that whatever concern might have been entertained about the "[c]ross-subsidization and undue discrimination" charged by petitioner UPS (Br. 39-42, 19-21) was satisfied by the requirement of a variable-cost rate floor. Above that floor the Commission was in fact encouraged, as DMMA points out (Br. 40-46), and as the statute requires, 39 U.S.C. 3622(b)(2), to consider the "value of * * * service" rendered each class.

A. The Kappel Commission Report And The Foster Associates Study Urged The Adoption Of A "Variable Cost" Rate Floor And The Assignment Of Institutional Costs According To "Value Of Service"

The first step toward passage of the Postal Reorganization Act was the appointment by President Johnson in 1967 of The President's Commission on Postal Organization. Exec. Order No. 11341, 3 C.F.R. 632 (1966-1970 Compilation). The Report of that Commission, *Towards Postal Excellence: The Report of The President's Commission on Postal Organization* (1968) (*"Kappel Commission Report"*), laid the conceptual foundation for the Act's ratemaking policy. The *Report's* discussion of ratemaking began with a criticism of the Cost Ascertainment System used by the Post Office since 1926 to determine the cost of each class of mail (*id.* at 30):

---

gers' Report, see note 36, *infra*). Indeed, the court stated that the House bill whose principles were included in Section 3622(b)(3) rested on an assumption "that discrimination in rates would not occur as long as each class covered 'as a minimum, the long-run variable costs ascribable to it—the full added costs demonstrably related to that class.'" Pet. App. 24a n.8.

> For determining costs it uses the "fully-allocated" method through which every postal expense is charged to some class of mail or special service. A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary but uninformative.

One of the basic weaknesses of that System was its "reliance on unsupported judgment for determining certain significant allocation bases, for example, the judgment used in connection with carrier street time * * *." *Id.* at 133. As a result, the *Kappel Commission Report* concluded that it did "not believe that *any* fully-allocated system is appropriate for rate-making." *Ibid.* (emphasis in original). Cf. J. Bonbright, *Principles of Public Utility Rates* 337-338 (1961).

What the *Kappel Commission Report* proposed instead was a two-tier process. As a first step, "to avoid undue discrimination * * * each class should bear, as a minimum, the *long-run variable costs* ascribable to it—the full *added costs demonstrably related* to that class" (*id.* at 131 (emphasis added)). Those costs might vary directly in response to changes in mail volume (like the costs of manual sorting). But they would also include capital costs, like the cost of a parcel sorter, that might be "directly attributable to a specific mail class" (*ibid.* n.*). The second step was the apportionment of "the large pool of institutional costs not determined by mail volume" (*id.* at 31), a pool that the Commission "estimate[d to] represent between 40% and 50% of total postal costs" (*id.* at 131). As an example the Commission cited much of the cost of city delivery, which changes not so much with fluctuations in mail volume as with such factors as growth and density of population (*ibid.*). These costs, the Commission recommended, should be distributed

among the various classes of mail according to a principle of "'[v]alue of service' * * *: what the customer gets and what he will pay" (*id.* at 133). The theory underlying this principle was that by assigning a larger percentage of institutional costs to classes with stronger demand, the Postal Service could increase volume and ultimately reduce average costs for all users (*id.* at 134).

Many of the Kappel Commission's conclusions about the deficiencies of the rate-making process were derived from a study of the process performed for the Commission by Foster Associates, Inc.[17] Its report, *Towards Postal Excellence: The Report of The President's Commission on Postal Organization, II Annex, (Contractors' Reports)* (1968) (*"Foster Associates Report"*), provides a more detailed basis for the conclusions reached by the Commission. For example, the *Foster Associates Report* criticized the Cost Ascertainment System's "reliance on unsubstantiated judgment * * * applied to significant proportions of total cost" (*id.* at 4-22). One example was the allocation of city delivery carrier costs, which accounted for 17% of the total cost of the postal service. Those costs were assigned to each class of mail on the basis of two factors, each weighted at 50%: the number of pieces of mail delivered for each class, and the number of stops at which deliveries of each class were made. Concerning that allocation system the *Foster Associates Report* stated (*id.* at 4-22 to 4-23; emphasis added):

> When the significance of one judgment approaches th[is] magnitude * * *, *it should be supported by a scientific evaluation of the importance of the two variables.* We suggest that such evaluation, for example, may consist of a series of controlled tests of carrier time in which the number of pieces varies but the number of stops is constant, or the number of stops varies while the number of pieces is con-

---

[17] Ernst & Ernst served as a subcontractor for Foster Associates and studied the Cost Ascertainment System.

> stant. The results of such tests might reveal that neither the variation in the number of pieces nor the number of stops significantly affects the total carrier street time, so that the carrier street time is largely in the nature of a fixed cost. Under these circumstances, assuming an allocation is necessary for the computation of fully-distributed cost, *the degree of variability* becomes a more appropriate technique for weighting the factors in the allocation.[18]

A second characteristic of fully-distributed-cost systems deprecated by the *Foster Associates Report* was their tendency to assign institutional costs "proportionately with directly assignable dollars regardless of the nature of the demand for the service" (*id.* at 5-3).[19] The *Report* con-

---

[18] The parallel between the Cost Ascertainment System and the suggestion by the administrative law judge in Docket No. R74-1, favored by petitioner NAGCP (NAGCP Br. 31) and by the D.C. Circuit (see *NAGCP I, supra*, 569 F.2d at 583-584), is striking. See note 12, *supra*. By contrast, the treatment of carrier street time in cost segment 7, described above at pages 5-6, rests on precisely the kinds of studies recommended in the *Foster Associates Report*. See C.A. App., vol. V, App. J., 70-120.

One can appreciate "the significance of [the] judgment" referred to by the *Foster Associates Report*, and the arbitrariness of allocating costs according to distribution keys unrelated to causation, by looking at the figures offered by the NAGCP in this rate proceeding. NAGCP's witness calculated different institutional cost distributions using three different keys: pieces, weight, and a combination of pieces and weight. C.A. App., vol. II, 810-812. His computations yielded average unit revenue figures for parcel post of $1.75, $6.42, and $4.95; the figures for second-class regular rate were $.159, $.408, and $.307. J.A. 217a.

[19] Cf. *NAGCP I, supra*, 569 F.2d at 584 (footnote omitted): "The ALJ's method for assigning the remaining costs is also quite opposed to principles underlying the Commission's adopted approach; it proposes complete rejection of the inverse elasticity rule. Under the alternative approach each class of mail bears that portion of unattributed costs equal to its proportionate share of attributed costs * * *".

cluded that "the estimates provided by a fully-distributed cost analysis have only a dubious value for rate-making." [20]

---

[20] *Foster Associates Report, supra*, at 5-4. Foster Associates qualified this conclusion in one respect. Where costs are divided between territories or legal jurisdictions they must be fully apportioned; otherwise, system costs may be ignored by each jurisdiction. That fact accounts for the persistence of fully-distributed costing, despite "general disapproval by economic and management authorities," in the regulation of gas pipeline and wholesale electric rates by the Federal Power Commission (now the Federal Energy Regulatory Commission), and in the telephone industry. *Ibid.*

Many of the cases relied on by the D.C. Circuit in *NAGCP I, supra*, 569 F.2d at 591, for its rule of maximum cost allocation are consistent with this distinction. See, *e.g.*, *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 588 (1945) ("The function which an allocation of costs (including return) is designed to perform in a rate case of this character is clear. The amount of gross revenue from each class of business is known. Some of those revenues are derived from sales at rates which the Commission has no power to fix. The other part of the gross revenues comes from the interstate wholesale rates which are under the Commission's jurisdiction. The problem is to allocate to each class of the business its fair share of the costs."); *Mississippi River Fuel Corp.*, 4 F.P.C. 340, 351 (1945) ("The rates for gas sold directly to industrial customers are not subject to our jurisdiction, so it is necessary to make an allocation of costs of service to segregate the regulated and unregulated business."). Cf. *Atlantic Seaboard Corp.*, 11 F.P.C. 43, 54 (1952) ("This problem is not unlike that which was presented to the Supreme Court in the Colorado Interstate case * * *."). But see *Permian Basin Area Rate Cases*, 390 U.S. 747, 804 (1968) ("There is ample support for the Commission's judgment that the apportionment of actual costs between two jointly produced commodities, only one of which is regulated by the Commission, is intrinsically unreliable."). In *Payne* v. *Washington Metropolitan Area Transit Commission*, 415 F.2d 901, 916-917 (D.C. Cir. 1968), the court actually suggested the appropriateness of using "value of service" principles, subject to two conditions: (i) that the lower-price service be charged its incremental costs, and (ii) that demand for the lower-price service be shown to be elastic.

In *Baltimore & O. R.R.* v. *Aberdeen & Rockfish R.R.*, 393 U.S. 87 (1968), relied on by petitioner NAGCP (Br. 28), the Court implied the appropriateness of using fully distributed costs when the ICC prescribed joint rates for northern and southern lines. But there the issue was division of revenues among joint providers of a service, not division of costs among customers. And since the

In place of this system of fully allocated costs the *Foster Associates Report* suggested that rates be set so that each class of mail cover its incremental (or marginal) costs, and that institutional costs then be apportioned among the various classes according to demand principles. The basis for the *Report*'s proposal was its conclusion that the Postal Service, like many public utilities, had decreasing unit costs with increasing scale. *Id.* at 3-13. Consequently, average costs should go down as more mail is delivered. Because some postal classes and services are less in demand than others, and because all would benefit from an increase in volume, it is in everyone's interest that the former be priced attractively. In the words of the *Report* (*id.* at 3-42):

> The practice of differential pricing [different prices for the same service] affords an opportunity to expand sales of public services under decreasing cost so as to obtain not merely the best practicable utilization of an existing capacity, but also to obtain for all users the benefits of declining capacity-related costs as expanding sales make possible employment of larger and better facilities and plants at lower unit costs.

Of course, average costs will only decrease—and interclass subsidies can only be avoided—if each new piece of mail is charged its marginal cost, which includes its contribution to long-run costs needed to increase capacity. *Id.* at 3-32, 3-35. For example, an increase in the number of clerks will eventually require more supervisors; such variations, though indirect, are properly part of marginal costs to the extent they can be attributed.[21]

---

demand for service is independent of how revenues are apportioned among the railroads who provide it, there is no justification for using demand elasticity as a distribution principle. As the Court noted, "in a North-South divisions case * * * [the] solution turns solely on costs * * *." 393 U.S. at 92.

[21] Another kind of capacity cost noted by the *Report* was the peak-load problem—the need to provide productive capacity that

B. The House Adopted The Recommendations Of The Kappel Commission

The House of Representatives, when it undertook consideration of the need for postal reorganization, was aware of the deficiencies associated with fully distributed costs and the Cost Ascertainment System (CAS). That approach to rate-making had been the subject of hearings, at which Assistant Postmaster General Hargrove testified that the Post Office intended to abandon CAS in favor of a system that showed demonstrably related costs. *Post Office Cost Ascertainment System: Hearings Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 71-72 (1969) (*"Cost Ascertainment System Hearings"*). When the Subcommittee met the following year to consider the Post Office's new cost system, Chairman Olsen convened the meeting by saying, "[t]he committee is most grateful to Assistant Postmaster General Hargrove for his agreement last year to abolish the cost ascertainment system and supply postal figures based on demonstrably related costs for the various classes and subclasses of mail." *Postal Rates and Revenue and Cost Analysis: Hearings before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 1 (1970) (*"Postal Rates Hearings"*).

What the House envisioned in place of the fictions and uncertainties of CAS's fully-distributed-cost system was a ratemaking process predicated—like that recommended by the Kappel Commission—on a marginal or variable cost theory. A rate floor was to be set by the attribution

---

is sufficient to handle the large volume during peak periods, but that is underutilized at other times. Examples are the Christmas rush, and the daily peak created by the need to process preferential classes of mail, like First Class, for next-day delivery. *Foster Associates Report, supra*, at 3-35. Because some classes of mail contribute to peaks more than others, the costs of providing peak capacity may to some extent be attributed. In Docket No. R80-1 USPS sponsored testimony tending to show that mail processing costs could be reduced by 17.06% if peaking were eliminated (J.A. 91a).

of marginal costs to each class of service. The costs that were to be included had two notable characteristics: they were to be costs that could plainly be shown to be caused by the class in question; and—a point related to the first—they were to be costs that varied with the volume of mail. Above that rate floor the institutional costs of the Postal Service were to be assigned to various rate classes according to more discretionary criteria.

The bill that ultimately resulted in the Postal Reorganization Act was introduced first in the House. The language concerning cost attribution was essentially identical to that in the *Kappel Commission Report* and remained unchanged throughout the House proceedings. H.R. 11750, 91st Cong., 1st Sess. § 1201(c) (1969); H.R. 17070, 91st Cong., 2d Sess. § 1201(c) (1970) (emphasis added):

> [T]he Postal Service shall establish * * * rates and fees for each * * * class of postal service so that *at least those costs demonstrably related to the class of service in question will be borne by each such class* and not by other classes of users of postal services or by the mails generally.[22]

The phrase "*demonstrably* related costs" was selected by the Kappel Commission to emphasize the departure from the "arbitrary," "uninformative," and "unsupported" judgments made by the Cost Ascertainment System. *Kappel Commission Report, supra*, at 30, 133. The House Report accompanying H.R. 17070 makes clear that the word "demonstrabl[e]" mean "identifiable" costs. H.R. Rep. No.

---

[22] The Kappel Commission had proposed that the Postal Service should

> fix rates and fees for each class of postal service so that the costs demonstrably related to the service in question will not be borne by other classes of users of postal services or by the mails generally.

Kappel Commission Report, supra, at 148. Other provisions in § 1201 were also drawn from the *Report*. Compare *Kappel Commission Report, supra*, with H.R. 17070, *supra*, § 1201(a), (b), (d).

91-1104, 91st Cong., 2d Sess. 10 (1970). Postmaster General Blount, testifying in support of the bill, stated that "[d]emonstrably related costs are those costs which can be traced directly to the class of service in question. The language of the bill calls for a hard, factual determination on this point * * *."[23]

The second point to be emphasized about "demonstrably related costs" is that they are costs that vary with the volume of mail. That point was explicit in the *Kappel Commission Report*, which used "demonstrably related" costs interchangeably with "long-run variable costs" (*id.* at 131) and distinguished them from institutional costs, which are "not determined by mail volume" (*id.* at 31). It was made equally clearly by Postmaster General Blount, the administration spokesman for the bill, who stated that the phrase "demonstrably related costs * * * purports to indicate the kind of costs that fluctuate with volume attributable to the various classes."[24] And it is implicit in the consistent understanding that "demonstrably related costs" meant the same thing as "marginal" or "incremental" costs.[25] Per-

---

[23] *Post Office Reorganization: Hearings Before the House Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 1273 (1969) (*"Post Office Reorganization Hearings"*). See also *id.* at 341-342 ("traceable" costs; "costs which you could prove are specifically related") (Assistant Postmaster General Hargrove); 634 ("clearly identif[iable]" costs) (former Postmaster General O'Brien); *Postal Reform: Hearings on H.R. 17070 Before the House Committee on Post Office and Civil Service*, 91st Cong., 2d Sess. 47 (1970) (Postmaster General Blount) (*"Postal Reform Hearings"*).

[24] *Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 1419 (1970) (*"Postal Modernization Hearings"*); *id.* at 1429 ("It is the costs that in effect fluctuate with volume * * *").

[25] *Post Office Reorganization Hearings, supra*, at 342 (Assistant Postmaster General Hargrove), 359, 1273 (Postmaster General Blount). The term "incremental cost" is defined by the *Foster Associates Report* to mean "the added cost of an *added unit of output* from a fixed plant." *Foster Associates Report, supra*, App. A, iv. "Long-run incremental cost" was used in the same way

haps the most precise statement of the point was the definition supplied by Assistant Postmaster General Hargrove at the *Postal Rates Hearings, supra,* at 75: [26]

> [Demonstrably related costs are t]hose costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.

The variability with volume need not be direct. Rather, the concept embraces the somewhat longer-term need to increase capacity in order to provide more service. For example, an increase of 2000 letters per day may necessitate hiring a new clerk; an increase of 18 clerks may require another supervisor. Both facets of cost may be demonstrably related. *Id.* at 4. By contrast, Mr. Hargrove stated, the cost of city letter carriers' walking time, and the cost of building occupancy, may properly be regarded as institutional. *Id.* at 5.[27]

---

as "long-run marginal cost," which the *Report* said required "consideration of full changes in total costs *per unit of added output,* taking into account * * * capacity additions." *Ibid.*

[26] The definition was taken from the Glossary of Terms in the Post Office's Revenue and Cost Analysis For Fiscal Year 1969, the cost analysis system begun by the Post Office in response to the Kappel Commission's criticisms of the Cost Ascertainment System.

[27] Although at the time Mr. Hargrove testified these costs were regarded as entirely fixed, some portions of them were determined to be variable in Docket No. R80-1. See pages 5-6, *supra*; C.A. App., vol. V, App. J, 111 (cost segment 7), 235 (cost segment 15).

How long a period should be considered in assessing volume variability is a question that admits of no precise answer. Mr. Hargrove's testimony seemed to suggest that the appropriate period was the time during which particular rates would be in effect. *Postal Rates Hearings, supra,* at 3. That proposal was also made in the *Foster Associates Report, supra,* at 3-32: "We think that the range covered by estimates of incremental cost should be as long as the rates in question are expected to remain effective. We here use the term *marginal* cost to describe this long-range estimate

Above this rate "floor" [28] of demonstrably related costs, which was estimated to amount to some 50% of total system costs,[29] was the tier consisting of all other costs. The House bill did not explicitly address the division of these costs, which was a matter of concern to some members. See *Postal Reform Hearings*, *supra*, at 48 (Representative McClure). Though this deficiency of the bill might have led to enforcement problems (had the conference not settled on the criteria now found in the Act), it was nonetheless clear what was intended: "[W]e would take into account * * * the value of service, the demand, the effect on volume, and so forth. We believe, however, that it would be unwise to make these factors ironclad matters of law. * * * [C]hanges in our market and cost situation might make an entirely different mix of factors more appropriate * * *." *Post Office Reorganization Hearings*, *supra*, at 1273 (Postmaster General Blount); *id.* at 612 (former Postmaster General O'Brien); *id.* at 898 (DMMA witness Louis Kislik). These were the very same considerations recommended by the *Kappel Commission Report*, *supra* at 31, 133-134, for the assignment of institutional costs.

C. The Senate Adopted The Same Approach As The House, Though With Less Emphasis On Cost Allocation

The D.C. Circuit (*NAGCP I*, *supra*, 569 F.2d at 588-589) and petitioners NAGCP (Br. 23-27) and UPS (Br. 26-36) have argued that whatever the intent of the

---

of incremental cost" (emphasis in original). See also J. Bonbright, *supra*, at 325. The *Kappel Commission Report*, *supra*, at 133, stated that a "five-year planning horizon * * * appears long enough for purposes of rate-making."

[28] *Post Office Reorganization Hearings*, *supra*, at 612, 621 (former Postmaster General O'Brien); *Postal Modernization Hearings*, *supra*, at 506 (Postmaster General Blount).

[29] *Postal Modernization Hearings*, *supra*, at 4, 521 (Postmaster General Blount), 733 (Harold F. Hammond).

House may have been, the history of the Postal Reorganization Act in the Senate and the version of the Act that emerged from conference support the conclusion that cost allocation must be carried much further than the Second Circuit's decision requires. This contention is plainly erroneous. It is obvious from the legislative history that the Senate was, if anything, less concerned with cost allocation than were the House and the Kappel Commission, and that the House conferees were responsible for the allocation provision in the version of the Act produced by the conference.

1. The clearest evidence of the Senate's intentions for ratemaking is its treatment of rates for parcel post. Until 1970 parcel post was required by statute to be self-sustaining, that is, to recover within 4% its fully allocated costs. See Pub. L. No. 89-593, 80 Stat. 815. The House, at the behest of private carriers, included a similar provision in the version of H.R. 17070 that went to conference. See H.R. Rep. No. 91-1104, *supra*, 40-41. In contrast to the underlying philosophy of the House bill, the section dealing with parcel post provided that that class should "bear, in addition to demonstrably related cost, other costs related to parcel post service as will assure that the revenue of such service will not be less than the cost thereof by 4 percent." *Id.* at 7.

Efforts were made in the Senate to secure inclusion of a similar provision. See *Postal Modernization Hearings*, *supra*, at 686-687 (UPS President Paul Oberkotter) (Congress should require "full cost recovery for parcel post"); *id.* at 688 (UPS Vice President Charles Forman) (parcel post should recover within 4% of its costs); *id.* at 713 (Spencer Moseley, REA) (rates should insure recovery of the "full amount of costs allocable to parcel post"); *id.* at 733 (Transportation Association of America President Harold Hammond) (parcel post should pay "its *full* costs of operation," not simply the 50%-65% that are demonstrably related) (emphasis in original). The Senate Report on the bill that went to conference had this to say:

> Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and *no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost.* That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law. Th[ose] criteria for ratemaking include seven specific requirements, among them, the effect of rate increases upon "enterprises in the private sector of the economy engaged in the delivery of mail other than letters." To go beyond that point would simply be to recommend provisions of law protecting a particular economic interest or limiting the availability of a Federal parcel delivery service.

S. Rep. No. 91-912, *supra*, at 17 (emphasis added). The Senate's position ultimately prevailed in conference, and the House's provision was deleted from the Act. Having failed to convince Congress of the need to protect its interests, petitioner UPS now seeks the assistance of this Court in rewriting the Act to include a variation on the fully-distributed-cost theme. It is not the role of this Court to undertake such editorial responsibilities.[30]

---

[30] UPS suggests that a comparison of the percentage increases in First-Class Mail and parcel post since 1970 shows that the Postal Service subsidizes parcel post with First-Class revenues (Br. 46). The percentage comparison is misleading. UPS does not include in its calculations an increase in parcel post rates that took place on November 14, 1970, when the Interstate Commerce Commission had regulatory oversight of that class of mail. R. 13113-13114. ("R." refers to the Record before the Postal Rate Commission.) Had it done so, the percentage increase in parcel post rates would have been significantly closer to the Consumer Price Index increase of 135%. It would also have been closer to the 107% increase in UPS rates during the same period. R. 12883. Moreover, other comparisons militate against the conclusion UPS would reach.

2. As the treatment of parcel post indicates, the thinking of the Senate about rate-making was remarkably similar to that of the House. It too was concerned about the deficiencies of the Cost Ascertainment System. S. Rep. No. 91-912, *supra*, at 10. And like the House the Senate envisioned a two-tier ratemaking process: "[R]ates and classifications are to be established on the basis of expert consideration of the overall value of the service provided and the allocation of costs on a scientific or quasi-scientific basis * * *." *Id.* at 11. The discussion of parcel post shows that the first step was to be the attribution of incremental costs in a "scientific" way. But unlike the House version, which required that "at least" demonstrably related costs be borne by each class, H.R. 17070, *supra*, § 1201(c), the Senate version contained only the precatory admonition that the Postal Rate Commission take into account "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail * * *." S. 3842, 91st Cong., 2d Sess. § 3704(g)(3) (1970). This ambiguous standard was a matter of concern to some. Senator Fannin, comparing the relative merits of the House and Senate proposals, remarked:

> The second critical defect in S. 3842 is its failure to include a minimum floor on postal rates. The substitute bill is extremely forthright in this regard: It * * * requires that each class of mail pay at least the costs which can be shown to be associated with its being carried as part of the mails. This requirement does not mean that overhead must be allocated

---

For example, parcel post constituted only .2% of total mail piece volume in fiscal year 1979, yet it contributed 1.65% of all institutional costs. R. 21518, 21520. In any event, as the Kappel Commission, the Foster Associates, and the House and Senate proceedings emphasize, the question of discrimination is to be answered not by a comparison of aggregate increases, but by whether each class of mail covers its "demonstrably related" or "incremental" cost. Neither the Commission nor any of the courts to consider the question has ever found that parcel post does not do so.

> in any set manner. It does mean, however, that incremental costs must be covered for each category of mail so that no non-preferred category can be said to be freeloading on other categories.
>
> S. 3842 does just the opposite. * * * S. 3842 does not require the ratemakers to require each class of mail to cover its costs. * * *.

116 Cong. Rec. 22053 (1970).

The second step in the rate-making process envisioned by the Senate was intended to involve the exercise of judgment. For example, the Senate Report stated that "[i]f the Commission in its assessment of the public interest determines that newsletters mailed by a church are, in fact, of such social benefit that they should pay less than a newsletter sent by the chamber of commerce, then the Commission is fully authorized to recommend * * * a rate in accordance with that preference." S. Rep. No. 91-912, *supra*, at 11. See also *id.* at 12. Restraints on the discretion of the new ratemaking authority were not intended to derive from any rule that cost allocation be extended to great lengths—a matter about which the Senate Report says absolutely nothing—but rather from an enumeration of the factors that the Commission should take into account in setting rates. There is no indication that any one of these "seven specific requirements," *id.* at 17, is preeminent. The Senate Report repeatedly emphasizes that rates are to be set in light of *all* the criteria fixed by the statute. *Id.* at 11, 14, 15, 17.

D. The Conference Adopted The House's Requirement Of Demonstrably Related Costs And The Senate's Discretionary Criteria For Assignment Of Institutional Costs

1. The version of 39 U.S.C. 3622(b)(3) that emerged from the conference of the two houses stated "the *requirement* that each class of mail or type of mail service *bear the direct and indirect postal costs attributable* to that class or type plus that portion of all other costs of

the Postal Service reasonably assignable to such class or type" (emphasis added). The structure of that provision mirrors the consistent thought—expressed in the *Kappel Commission Report*, the *Foster Associates Report*, and the House and Senate proceedings—that the ratemaking process would include two tiers: an attribution of marginal (incremental, added, variable, or demonstrably related) costs, and a reasoned assignment of all the other costs of the Postal Service according to the factors listed in Section 3622(b).

Petitioners UPS (Br. 30) and NAGCP (Br. 25-27) contend that the Senate version on cost allocation prevailed in conference.[31] The Conference Report contains

---

[31] Virtually the only evidence that petitioners are able to adduce in support of that conclusion is the fact that Section 3622(b)(3) uses the words "attributable" and "assignable," both of which appeared in bills considered by the Senate (See UPS Br. 28-30; NAGCP Br. 24). The original Senate bill referred to "the amount of operating costs, overhead, and other institutional costs * * * properly *attributable* to each class of mail in proportion to its share of mail volume[.]" S. 3613, 91st Cong., 2d Sess. § 3703(c)(2) (1970) (emphasis added). The final Senate version read: "operating costs, the amount of overhead, and other institutional costs properly *assignable* to each class of mail[.]" S. 3842, *supra*, § 3704(g)(3). See also S. Rep. No. 91-912, *supra*, at 15 ("operating costs and the amount of institutional costs properly *assignable* to each class of mail"). One likely explanation is that the change was simply inadvertent. The words "attribute" and "assign" have no technical meaning to accountants or economists. The Kappel Commission, for example, used the word "assign" to describe the allocation of both variable costs and fixed costs. *Kappel Commission Report*, *supra*, at 133. It was equally loose in its use of the word "attribute." *Id.* at 131 n.*. If the change was intentional, the most probable explanation supports the contention advanced by the Postal Service here. As petitioner DMMA's brief suggests (Br. 16), the most commonly accepted meaning of "attribute" is "to ascribe * * * [b]y way of cause[.]" The original Senate bill called for "attribut[ing]" costs according to the volume of each class. Though primitive, this was no doubt intended to suggest a causal connection between volume and cost. When the Senate abandoned the idea of cost in proportion to volume it also appropriately abandoned the idea of attribution in favor of assignment. When the confer-

only the text of the Act without comment. Senate Journal, 91st Cong., 2d Sess. 719-746 (Aug. 3, 1970). But the language of subsection (b) (3) adopted by the conference bears little resemblance to the comparable provision of S. 3842 (see page 34 & note 31 *supra*). On the contrary, the addition of the term "requirement"—notably absent from the Senate version—merely takes the place of "at least" in H.R. 17070 (see page 28, *supra*). The change in terminology reflects the House's insistence that there be a rate floor, not the Senate's supposed insistence that cost distribution overwhelm the other factors it had been so careful to include. Contrast *NAGCP I*, *supra*, 569 F.2d at 585-589. Similarly, the reference to "direct and indirect" costs is not, as petitioners (UPS Br. 24; NAGCP Br. 17; DMMA Br. 26) and the D.C. Circuit (*NAGCP I*, 569 F.2d at 585) have contended, an effort to embrace the entire universe of costs within the attribution requirement. Rather, it is simply a restatement of the demonstrably-related-costs principle, which from the beginning had been defined to include "direct or indirect" costs. *Postal Rates Hearings*, *supra*, at 75. So, too, the reappearance of the verb "bear"—present in H.R. 17070 but not in S. 3842—emphasizes that it is the House, not the Senate, version that the conference adopted.[32] That the phrase "demonstrably related costs" itself does not appear in the final bill does not indicate a rejection of the underlying idea, but simply a clarification of what some had found a difficult concept.[33] On the

---

ence decided to set a floor of demonstrably related (volume variable) costs, it correctly reintroduced the term "attributable" to describe those costs.

[32] Petitioner NAGCP (Br. 26-27) correctly contends that the conference was working from the Senate bill, and that "a change of language in conference is strong evidence of an intended change in substance." The language that was in fact rejected was that of S. 3842.

[33] A number of witnesses and Congressmen expressed confusion during the hearings about the meaning of the term "demonstrably related costs." See *Post Office Reorganization Hearings*, *supra*, at

other hand, the inclusion of guidelines for discretionary assignment, 39 U.S.C. 3622(b)(1), (2), (4)-(7), (9),[34] was a concession to the Senate's preoccupation with that aspect of rate setting.[35]

2. This interpretation of the conference's activity is confirmed by the explanation given by Representative Udall—sponsor of the House bill and conference manager on the part of the House—in the course of debate on the day the House adopted the bill:

> This phrase [demonstrably related costs], while finally deleted in the final bill, was used throughout the conference to express the feeling that each class of mail pay those direct or indirect costs attributable to it.

359, 898, 1029; *Postal Modernization Hearings, supra,* at 561-562, 596, 1429-1430; J.A. 305a n.29 (" 'demonstrably related' * * * was 'difficult to pronounce' ").

[34] 39 U.S.C. 3622(b)(8) was added by the Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, Section 10, 90 Stat. 1311.

[35] In *NAGCP I* the D.C. Circuit imagined a scenario in which, "[i]n exchange for the retention of enumerated preferences, the House accepted the Senate's standards for allocating costs." 569 F.2d at 589. The court cited the Conference Report, H.R. Rep. No. 91-1363, 91st Cong., 2d Sess. 85-87 (1970), for its conclusion. But the Report contains no hint of any such exchange. On the contrary, the portion cited by the court states that "[t]he conference substitute adopts the Senate provision [of 3622(b)] with an amendment which incorporates the standard" of demonstrably related costs. *Id.* at 87. Moreover, when Senator McGee—sponsor of the Senate bill—summarized to the Senate the issues resolved in conference, he mentioned that the House had prevailed on rate preferences, but said nothing about the supposed House concession on cost allocation. 116 Cong. Rec. 26953-26954 (1970). It is unlikely that the lead Senate conferee would report to his colleagues a concession made to the House without even mentioning the purported concession received in exchange. It is far more probable that, in exchange for retaining reduced rates for the classes of mail favored by the House, the House agreed to the continuation of "public service" appropriations insisted on by the Senate. See 116 Cong. Rec. 26953-26954 (1970).

> We agreed that the principle of the House bill be included in the final version of the legislation. This would establish a "floor" for each class of mail equal to costs called "demonstrably related costs" in the House version and "attributable costs" in the final version. Such costs consist of those costs, both direct and indirect, which vary over the short term in response to changes in volume of a particular class ~~of~~ [on] which, even though fixed rather than variable, are the consequence of providing the specific class or service involved. The committee felt that such costs were capable of objective determination and proof either by empirical observation or deductive analysis. In addition to this threshold requirement, the legislation provides for a judgmental assignment of some part of the remaining costs. The judgment as to what portion of institutional costs should be borne by each class is to be made in the light of the criteria in the bill.

116 Cong. Rec. 27606 (1970). This statement by the sponsor of the House bill cannot simply be ignored. See *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14; *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). Moreover, Representative Udall's explanation did not represent just his own interpretation of the conference proceedings. It is confirmed by the Statement of the Managers on the Part of the House, H.R. Conf. Rep. No. 91-1363, *supra*, at 79, which was appended to the Conference Report. That Statement explained (*id.* at 87):

> The conference substitute adopts the Senate provision [of Section 3622(b)] with an amendment which incorporates the standard that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.
>
> The provision in the conference substitute with respect to costs attributable to a class of mail or type

> of service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.[36]

---

[36] The background and meaning of this statement are of some importance. Petitioners NAGCP (Br. 27) and DMMA (Br. 28) assert that "[t]he House Statements * * * have no antecedent in the legislative history." Petitioner UPS (Br. *passim*) argues that, in unwitting reliance on the House Managers' Statement, the court of appeals incorrectly held that the Act fixed a rate floor of only short-run variable costs.

Except for the addition of the phrase "short term," both Representative Udall's and the House Managers' definitions of "demonstrably related costs" were taken almost verbatim from the *Post Office's Revenue And Cost Analysis For Fiscal Year 1969*, which was introduced by Assistant Postmaster General Hargrove at the *Postal Rates Hearings*, *supra*, at 75. See page 30, *supra*.

As Mr. Hargrove's testimony revealed, the information available at that time permitted the tracing of only "shorter" run costs. And because Congress expected a rate proceeding to begin soon after the statute was enacted, it would have been futile to require accounting refinements that, as subsequent events bore out, would take several rate proceedings to develop. The Act itself was wisely drawn to accommodate such future developments; the House Managers' and Representative Udall's statements, on the other hand, properly explain what extent of attribution Congress expected would be immediately undertaken.

Mr. Hargrove's testimony also illustrates that, even at the time the Act became effective, the phrase "short term" did not have the limited horizon ascribed to it by petitioners. Mr. Hargrove testified that in the Revenue and Cost Analysis "[w]e have settled on a shorter term approach since the length of an appropriate longer term would be a very difficult thing to decide upon, and ratemaking—being a continuous process—can take the longer term effect into account when it occurs." *Postal Rate Hearings*, *supra*, at 3. He went on to explain, however, that "shorter term" variable costs would include such "overhead costs" as supervisory costs (*id.* at 4), which in an appropriately defined "short term" might

Petitioners, recognizing that these statements are effectively dispositive of their claims, are at pains to deride their significance (DMMA Br. 28-30; UPS Br. 33-36; NAGCP Br. 26-27).[37] But this is not a case where the report of one house is contradicted by the other house. Contrast *Department of the Air Force* v. *Rose*, 425 U.S. 352, 363 (1976); *Vaughn* v. *Rosen*, 523 F.2d 1136, 1140-1142 (D.C. Cir. 1975); *Soucie* v. *David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971); *D.C. Federation of Civil Associations, Inc.* v. *Volpe*, 434 F.2d 436, 444 n.38 (D.C. Cir. 1970); *Benson* v. *GSA*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969). On the contrary, Senator McGee, sponsor of the Senate bill, stated on the Senate floor after the conference that the phrase "direct and indirect postal costs attributable to mail of such class or kind" meant "actual postal costs, excluding any overhead costs." 116 Cong. Rec. 26954

---

appear fixed. The phrase "shorter term" as he used it thus seems to be consistent with the suggestions of the Kappel Commission and Foster Associates concerning the length of time over which marginal costs should be measured. See note 27, *supra*.

Contrary to the assertion of petitioner DMMA (Br. 28), the House Statement's reliance on the Post Office's Revenue and Cost Analysis makes transparently clear that the statutory rate floor was intended throughout the legislative proceedings in the House to be limited to "volume-variable costs." DMMA is correct in asserting that the "indirect" costs do not vary in a linear fashion with changes in volume (Br. 17 n.34, 28-29 n.63). But it is a non sequitur to conclude that, because Congress included costs that vary indirectly with volume, it also intended to require attribution of costs that do not vary with volume.

[37] UPS, quoting from the House Managers' Statement, argues that " '[t]he conference substitute [bill] adopt[ed] the Senate provision' " (Br. 35). As can be seen from the full quotation in text above, however, the Statement went on to say that the Senate provision was adopted "with an amendment which incorporates" a new Section 3622(b)(3). UPS omits this crucial qualification.

(1970).[38] The Statement of the Managers on the Part of the House and the remarks of Representative Udall are not as conclusive as a report produced by the whole conference would be. But they are the only post-conference statements about this provision available and, at minimum, they plainly represent the understanding of the House of Representatives at the time it passed the bill adopted by the Conference. These remarks, moreover, are entirely consistent with the preceding legislative history and with the modifications in the bill that emerged from conference. It would be folly to ignore them, and irrational to presume that they distort the intent of the conference.

E. Congressional Action Since Adoption Of The Postal Reorganization Act Demonstrates Approval Of The Position Reached By The Court Of Appeals In This Case

Petitioner UPS contends that Congress's failure in 1978 to pass legislation that would have overruled *NAGCP I* should be understood as an endorsement of that decision (UPS Br. 38-39). In fact, a more careful examination of Congress's actions since passage of the Postal Reorganization Act demonstrates the contrary.

In the Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, Section 7, 90 Stat. 1307-1310, Congress established a seven-member Commission on Postal Service whose mission in part was to study the ratemaking provisions of the Act. The Commission's report the following year condemned Chief Judge Bazelon's concurring opinion in *Association of American Publishers, Inc.* v. *Governors of USPS*, *supra*, as contrary to the language

---

[38] Senator McGee was interpreting the phrase that appears in 39 U.S.C. 3626(a)(1), defining reduced rates for certain preferential classes of mail. The phrase is virtually identical to the first rate tier in Section 3622(b)(3). See page 19, *supra*. Reduced rate mail thus bears its marginal costs, but is subject to no assignment of other costs.

and history of the 1970 Act and counterproductive in its effort to reduce First-Class Mail rates. *Report of the Commission on Postal Service* 60-64 (1977). The Commission's recommendation for a 60% ceiling on cost attribution was incorporated in two bills introduced in Congress in 1978. H.R. 7700, 95th Cong., 2d Sess. § 2(b); S. 3229, 95th Cong., 2d Sess. § 6(a). H.R. 7700 passed the House on April 6, 1978. The Senate bill was not reported out of committee before the May 15 deadline imposed by Section 402(a) of the Congressional Budget and Impoundment Control Act of 1974, 31 U.S.C. 1352(a). Because the bill called for larger appropriations for the Postal Service, it required a waiver from the Budget Committee, which was refused without consideration of the merits of the bill. S. Rep. No. 95-1244, 95th Cong., 2d Sess. 3 (1978). Thus, the bill's failure of enactment hardly signals congressional approval of the D.C. Circuit's wayward interpretation of Section 3622(b).[39] On the other hand, the House on several occasions rejected an amendment that would have endorsed the *NAGCP I* result. Each time the amendment was defeated without a roll call. 121 Cong. Rec. 30777-30784 (1975); 124 Cong. Rec. 8857-8860 (1978).[40]

More significant than the legislation that Congress failed to enact in 1978 is a provision that it did include

---

[39] Even if the Senate bill had been voted on and rejected, its defeat would have signified little about Section 3622(b). The bill was quite broad in scope, and contained much that would have been far more controversial. The Senate bill authorized a $1 billion public service subsidy and reinstated a measure of presidential and congressional control over the Postal Service. See 124 Cong. Rec. 18451-18453 (1978). For these and similar reasons the Postal Service itself opposed both bills. *Postal Service Amendments of 1978: Hearings on S. 3229 and H.R. 7700 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 604-635 (1978).

[40] A Committee of the Whole House defeated the amendment still another time, a month after its initial defeat. 121 Cong. Rec. 34433 (1975).

in the Postal Reorganization Act Amendments of 1976. Section 10 of those Amendments added a new discretionary criterion to be considered in rate-making: "the educational, cultural, scientific, and informational value to the recipient of the mail matter." 39 U.S.C. 3622(b)(8). The amendment was added three years after Chief Judge Bazelon's opinion in *Association of American Publishers, Inc.*, which foreshadowed *NAGCP I*. The new factor seems to have been in part a response to the overemphasis on maximum cost allocation in that opinion. Speaking in support of the amendment, Representative Ford criticized the opinion, and noted that thenceforth the Commission would be "require[d to consider] the educational or other value of the mail matter in setting rates." 122 Cong. Rec. 29748 (1976). By creating a further non-cost factor, Congress demonstrated that it was less concerned with maximizing cost attribution than with a proper discretionary assignment of institutional costs.

III. CONGRESS DID NOT DIRECT THE ATTRIBUTION OF SERVICE-RELATED COSTS TO PREFERENTIAL CLASSES OF MAIL

In response to the D.C. Circuit's direction in *NAGCP I* that it employ a three-tier rate-setting process, 569 F.2d at 589, the Postal Service in the fourth general rate proceeding proposed that—after costs had been "attributed" according to principles of volume variability—it should "assign" an additional set of Service-Related Costs (SRC) based on more attenuated inferences of causation. SRC assumed that, were it not for certain preferential categories of mail, the Postal Service would only operate on a three-day-a-week delivery schedule. The Postal Service thus assigned to First Class, second class, and parcels the fixed costs of delivery representing the difference between this hypothetical schedule and a six-day-a-week schedule. The D.C. Circuit approved the concept (*NAGCP III*, *supra*, 607 F.2d at 404-412), and the Commission—considering itself bound by that decision—employed it in its rec-

ommended decision in this case. C.A. App., vol. IV 108; *id.* at vol. V, App. J., 260-274.[41] The court of appeals in this case held that the Commission was free, if it wished, to abandon SRC and "return to the methodologies used in the first three rate-making proceedings" (Pet. App. 48a). It also stated that SRC, while not required by the Act, was nevertheless not forbidden, and that "[w]hile some of its assumptions are, to put it mildly, optimistic, * * * [it is not] so unrealistic a model as to call into question the rationality of" SRC. *Id.* at 31a, quoting *NAGCP III*, *supra*, 607 F.2d at 409-410.

Petitioner DMMA contends that Service-Related Costs are tier-one costs, and that the court of appeals erred in holding that the Commission had discretion to attribute them (Br. 41 & n.83). NAGCP, by contrast, argues that any allocation of SRC is forbidden by the Act (Br. 32-37).[42] The language of the statute and the legislative his-

---

[41] The Commission had expressed dissatisfaction with the three-tier approach to rate-setting in the fourth general rate proceeding (Pet. App. 15a-16a). It stated in this case as well that such an approach was not required by the statute. PRC, Opinion and Recommended Decision Upon Reconsideration, Docket No. R80-1, at 69 n.2. The Commission suggested, however, that SRC—while not required—was "permissible under either a two-tier or three-tier interpretation of § 3622(b)(3)." *Id.* at 70.

The USPS Governors' September 30, 1981 modification decision abandoned the SRC concept. See note 14, *supra*. The Second Circuit in *Time, Inc.* v. *USPS*, *supra*, upheld the Governors' authority to do so, but only if they could demonstrate that the use of that methodology would not produce the revenues required to meet the Postal Service's costs. Slip op. 3895. (The court reiterated that the Commission was free to abandon SRC even if the revenue requirement *were* satisfied. *Id.* at 3894.)

[42] NAGCP suggests (Br. 32) that the Commission measured SRC by simply dividing the cost of a six-day delivery system in half. In fact, the process was considerably more complex. It involved constructing a model of how delivery operations would be reorganized if there were no preferential service standards. The Commission then estimated the cost of this reorganized delivery operation and calculated the resultant cost saving over the current method of operation. See C.A. App., vol. IV, 145.

tory reviewed in Parts I and II above support the conclusion of the court of appeals. SRC is clearly not mandated by the Act; its acceptance or rejection is a matter within the discretion of the Commission or, in a proper case,[43] the Postal Service.

In enumerating the factors that the Commission must take into account in setting rates, Section 3622(b)(2) states that one consideration is "the value of the mail service actually provided each class * * * of mail service to both the sender and the recipient, including * * * priority of delivery[.]" That provision suggests that the costs currently identified as SRC may, in the agencies' sound discretion, properly be allocated to the classes that receive priority of delivery according to principles of demand (value to the users) rather than cost (to the supplier). Moreover, as the analysis of Section 3622(b)(3) in Part I makes clear, the D.C. Circuit erred in holding that the Act requires the Commission to "attribute" and "assign" costs according to extended inferences of causation and cost-of-service principles. Thus, the language of the Act undercuts in two ways the theory of cost allocation that gave birth to the concept of a mandatory SRC.

DMMA states that the legislative history of the Act nonetheless supports inclusion of peak-load capacity costs among the "direct and indirect attributable costs" covered by Section 3622(b)(3), and consequently infers that Service-Related Costs are attributable as well (Br. 18-26, 37 & n.77).[44] But as DMMA (Br. 20-21), the *Kappel Commission Report*, *supra*, at 133, and the *Foster Associates Report*, *supra*, at 3-33 to 3-35, have recognized, peak-load costs are variable costs: the larger the volume of mail, the larger the peak, and the larger the labor capacity needed to handle it. The costs identified as SRC,

---

[43] See notes 14, 41, *supra*.

[44] In the fifth general rate proceeding more than $400 million in peak-load mail-processing costs were identified and attributed to the classes of mail that caused them. C.A. App., vol. V, App. J, 27-28.

by contrast, are fixed costs (see DMMA Br. 39 n.80). The extra trips made around their routes by mail carriers do not result from the impossibility of otherwise distributing the mail, but—in theory—from a mandate to provide daily service regardless of how much mail they are carrying.[45] That difference makes it difficult to attribute responsibility, and hence costs, in any scientific way among the various classes of preferred mail. Furthermore, it is at least open to doubt whether the preferred classes as a whole are the cause of the six-day delivery schedule. The Commission found as a fact in the fourth general rate proceeding that "[i]f there were no preferential service standards, the Postal Service would deliver mail three days per week." C.A. App., vol. IV 148. Since that time, however, Congress has by statute prohibited any variation from the present delivery schedule. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1722, 95 Stat. 759. Thus, even if the statute would permit the abolition of preferential classes of mail, doing so would work no change in six-day delivery.

There is also, as the D.C. Circuit recognized in *NAGCP III*, a "free-rider" problem inherent in the system of SRC that calls for an exercise of discretion on the part of the rate-setting agency (607 F.2d at 409 (footnote omitted)):

---

[45] One might argue that SRC, though they are not variable, are akin to specific fixed costs, whose attribution was also contemplated by Section 3622(b)(3). That claim, however, is subject to many of the same uncertainties that attend the analogy to peak-load costs. Unlike the example of a parcel sorter cited by the *Kappel Commission Report*, *supra*, at 131 n.*, there is some question whether the costs of six-day delivery are caused by preferential mail. Even if they are, such costs are joint costs among the various preferred classes. And nonpreferential classes share in the benefits of six-day delivery in a way that other classes would not benefit from a parcel sorter. The existence of such uncertainties suggests that these matters should be settled (and revisited periodically, if necessary) in agency proceedings and decision-making, and not by reading rigid, but nonexistent, requirements into the statute.

> Although the non-preferential classes may not require six-day delivery, in practice they are often delivered without deferral, and so receive the benefit of six-day delivery capacity.
>
> * * * * *
>
> In general we agree with the first-class users that there is good reason, in economics and common sense, to call upon nonpreferential classes to contribute to the capacity costs used in providing them a benefit. However, as applied to the costs entailed in maintaining a six-day system, the question is not a simple one. There is a question whether and to what extent the users of this nonpreferential mail receive a benefit of value. On the record, we cannot hold that the PRC abused its discretion * * *.

In these circumstances the proper treatment of SRC is plainly not a matter that Congress would even have wished, had it foreseen the issue, to resolve by fiat. Such problems as the extent of causation by preferential classes as a whole, the relative responsibility among the various preferential classes, the nature of the benefit conferred on nonpreferential classes, the value of delivery priority to those who receive it, and the effect that assignment of SRC might have on the Postal Service's revenue requirement are issues best left to the affected agencies to resolve in accordance with the general criteria and the distribution of responsibility set forth in the Act.

* * * * *

Petitioners UPS (Br. 15) and NAGCP (Br. 21, 23, 25, 37) intimate that to affirm the court of appeals' decision would be to discriminate against First-Class Mail users—to return to the same postal rate structure that before the Act was dictated "by lobbyists representing major mailers who use[d] the specialized classes of mail * * *" (UPS Br. 15). But as the Act and its history make clear, Congress afforded sufficient protection against discrimination by setting a rate floor of variable costs,

and leaving to the discretion of the Commission and the Postal Service—acting in their respective spheres and guided by the specific factors enumerated in Section 3622(b)—the assignment of responsibility for costs above that floor. It is equally important to a proper understanding of this case, though, to realize that there is no such dichotomy between First-Class and other mail users as petitioners would suggest. Approximately 72% of First-Class Mail is sent by business, not household, mailers. R. 22030. On the other hand, non-business mailers are concerned with the rates for all classes of mail since, directly or indirectly, they bear the costs of all types of mail services. R. 30350-30356. The public directly pays the necessary postage for numerous items delivered through the mail—newspapers, magazines, parcels, books, and catalogs. The public also pays directly as senders of letters and parcels. Finally, the public pays indirectly for postage costs passed on by business mailers who send advertising and bills.

Each of the petitioners has urged this Court to adopt an interpretation of the Act designed to minimize that petitioner's own mail costs. But the massive task of rate-setting, which involves the distribution of billions of dollars of costs among literally thousands of discrete rates, should be undertaken in a fashion that is both expert and disinterested. Congress wisely chose to mitigate the force of parochial considerations by delegating the decision to agency discretion, subject to the broad mandate in Section 3622(b). The judgment of the court of appeals leaves the accommodation of the various affected interests where it was entrusted by Congress.[46]

---

[46] The Postal Rate Commission has authorized us to state that it agrees that the decision of the court of appeals is correct and should be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

LOUIS A. COX
General Counsel

FRANCES G. BECK
Associate General Counsel
United States Postal Service

SEPTEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 383408 1088

Respondent's Brief

2

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

October Term, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN BUSINESS PRESS

Robert A. Saltzstein
Counsel of Record
Stephen M. Feldman

Joseph J. Saunders

WYATT AND SALTZSTEIN
1725 DeSales Street, N.W.
Washington, D.C. 20036
(202) 638-4485

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTIONS PRESENTED FOR REVIEW

Which is the correct interpretation of the ratemaking provision of the Postal Reorganization Act (39 U.S.C. § 3622(b)):

(a) the parallel opinions of Judge Mackinnon of the United States Court of Appeals for the District of Columbia in *National Association of Greeting Card Publishers v. United States Postal Service* (USPS), 569 F.2d 570 (1976), hereinafter referred to as NAGCP I, and the opinion of the United States Court of Appeals for the Second Circuit in *Newsweek et al. v. USPS,* 663 F.2d 1186 (1981), *or*

(b) the Per Curiam opinion in *NAGCP I* written by Judge Bazelon, reflecting the same undue emphasis on cost of service alone that he had expressed in *Association of American Publishers v. USPS,* 485 F.2d 768, (1973), the first Postal Rate Commission (PRC) decision appealed to the United States Court of Appeals for the District of Columbia.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... (i)

TABLE OF AUTHORITIES ..... (v)

STATEMENT OF THE CASE 1

A. American Business Press (ABP): The Association Of Smaller Circulation Business Periodicals 1

B. The Purpose of Second Class Mail 2

C. The Current Rate Structure Of Second Class Reflects Its Informational Value As Well As Cost 6

D. Nationally Circulated Smaller Periodicals Depend Exclusively On The Postal Service 8

E. Circulation Size In Second Class Directly Affects The Postal Cost Per Copy Of Second Class Periodicals 9

F. Because Of The Strictures of the NAGCP I Decision, Increased Second Class Rates Discriminatorily Impact On Smaller Circulation Periodicals As Compared With Larger Circulation Periodicals 11

SUMMARY OF ARGUMENT 15

ARGUMENT 17

A. The D.C. Circuit View Expressed By Judge Bazelon Unduly Emphasized The Word "Requirement" In § 3622(b)(3) 17

B. Judge Mackinnon's Separate Opinion In NAGCP I Demonstrates Why The Per Curiam Opinion Was In Error 21

Page

C. Because of NAGCP I, USPS And The Postal Rate Commission Have Been Forced To Adopt Cost Allocations Not Supported By Reality 26

D. Since Passage Of The Postal Reorganization Act, Congress Has Rejected Cost Alone As a Requirement, Both Before And After NAGCP I 29

E. The Second Circuit Interpretation Of § 3622(b), Like Judge Mackinnon's, Is The Correct Interpretation 34

F. The Impact Of The Second Class Zone Rates Proposed By USPS In R80-1 Falls Hardest On Smaller Circulation Periodicals 38

G. The Extreme Cost Attribution Positions Of The United Parcel Service And The National Association Of Greeting Card Publishers Should Be Rejected 39

CONCLUSION 41

TABLE OF AUTHORITIES

Cases: **Page**

Association of American Publishers v. Governors of U.S. Postal Service, 485 F.2d 768 (D.C. Cir. 1973) ..... i, 15, 16, 22

Board of Governors v. First Lincolnwood Corp., 439 U.S. 234 (1978) 34

Hannegan v. Esquire, 327 U.S. 146 (1946) 2

National Association of Greeting Card Publishers v. U.S. Postal Service, 607 F.2d 392 (D.C. Cir. 1979) *cert. denied* 444 U.S. 1025 (1980) (NAGCP III) ..... *passim*

Newsweek v. United States Postal Service, 663 F.2d 1186 (2d Cir. 1981) ..... (i), 15, 29, 34, 37, 40, 41

Philbrook v. Glodgett, 421 U.S. 707 (1975) 24

Richards v. U.S., 369 U.S. 1 (1962) 24

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) 37

Time, Inc. et al. v. United States Postal Service, Docket Nos. 4183 *et al.* (decided July 9, 1982) 13

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) 37

Statutes:

Former Title 39 U.S.C. § 4351-4354 (1964) 5

Postal Reorganization Act of 1970 ..... *passim*

39 U.S.C. § 101 ..... 29, 31

3622(b) ..... *passim*

3623 ..... 3, 5

3624 35

3625 15

Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, 90 Stat. 1303 ..... 17, 32

§ 5 17

§ 10 32

Omnibus Budget Reconciliation Act of 1981, 95 Stat. 357, 97th Cong 1st Sess. 30

Act of June 30, 1974, Pub. L. No. 93-328, 88 Stat. 287 3-5

Classification Act of 1879, 20 Stat. 359 2

Act of May 8, 1794, 1 Stat. 354 2

Agency Decisions:

Postal Rate Commission Opinion and Recommended Decision Docket R74-1 (1975) 18

Postal Rate Commission Opinion and Recommended Decision Docket R77-1 (1978) 6, 7, 23, 26-28

Postal Rate Commission Opinion and Recommended Decision Docket R80-1 (1981) 5, 6, 12, 36-38

Decision of the Governors of the United States Postal Service, Docket R80-1, March 10, 1981 ..... 14, 27-28

Decision of the Board of Governors of the United States Postal Service, Docket R80-1, September 29, 1981 15

Legislative Materials:

House Rep. No. 93-1054, 93rd Cong., 2d Sess. (1974) reprinted in 2 U.S. Code Cong. and Administrative News 3406 (1974) 3-4

Senate Rep. No. 91-912, 91st Cong., 2d Sess. (1970) 34, 37

Conference Rep. No. 91-1363, 91st Cong., 2d Sess. (1970) reprinted in 2 U.S. Code and Administrative News 3712 (1970) 25

116 Cong. Rec. 27605 (August 6, 1970) 25-26

116 Cong. Rec. 27606 (August 6, 1970) 19-20

122 Cong. Rec. 29748 (September 10, 1976) 3

S. 3842, 91st Cong., 2d Sess. (1970) 31

House Committee on Post Office and Civil Service, Postal Reorganization Act Amendments of 1976, Legislative History, Committee Print No. 94-20, 94th Cong., 2d Sess. (1976) 32-33

Miscellaneous:

1981 Annual Report of the Postmaster General 40

IN THE

Supreme Court of the United States

October Term, 1981

Nos. 81-1304 and 81-1381

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,

Petitioner,

v.

UNITED STATES POSTAL SERVICE,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT AMERICAN BUSINESS PRESS, INC.

STATEMENT OF THE CASE

A. American Business Press: The Association Of Smaller Circulation Business Periodicals.

ABP is an association of over 500 smaller circulation business periodicals published throughout the United

States and circulated nationally. They are trade journals, specialized in content and circulation. Examples are: *Aviation Week and Space Technology* (New York), *Purchasing,* (Boston), *The Packer* (Kansas City), *Coal Mining and Processing* (Chicago), *Automotive News* (Detroit), *The National Fisherman* (Camden, ME), *Medical Economics* (Oradell, NJ), *Machine Design* (Cleveland), *Feedstuffs* (Minneapolis), *Pulp and Paper* (San Francisco), *Bobbin* (Columbia, SC), Iron Age (Philadelphia) and *Oil and Gas Journal* (Tulsa). These smaller circulation periodicals are all mailed at the second class rate; they are typical of most nationally circulated smaller circulation periodicals, whether such publications are trade journals, literary journals, or any other type. ABP members have been, and are, representative of smaller circulation periodicals mailed nationally at second class rates.

B. The Purpose Of Second Class Mail

Second class is a class of mail established by Congress in 1879. Classification Act of 1879, 20 Stat. 359, Ch. 180 § 7. This Act codified previous encouragement of nationwide dissemination of information. (Act of May 8, 1794, 1 Stat. 354, 362, Ch. 23). This Court has described the purpose of the second class rate as follows:

> The policy of Congress has been clear. It has been to encourage the distribution of periodicals which disseminate 'information of a public character' or which were devoted to 'literature, the sciences, arts or some special industry', because it was thought that those publications as a class contributed to the public good. *Hannegan v. Esquire,* 327 U.S. 146, 154 (1946).

In the Postal Reorganization Act of 1970 (39 U.S.C. § 3622 and 3623), Congress delegated ratemaking and

classification authority to the Postal Rate Commission (PRC). Congress did *not* abolish the second class rate. What Congress did was to continue appropriations for second class initially for five years, and then for an additional three years. Congress simultaneously provided that at the expiration of the five and eight year phasing periods, the non-cost criteria in § 3622(b) would distinguish second class from other classes of mail through the application of judgmental factors by the United States Postal Service (USPS) and (PRC), so as to provide a different rate for second class. As subsequently stated in Congress, this was to distinguish "a book from a brick." Jt. Legislative Appendix, p. 376, 122 Cong. Rec. 29748 (September 10, 1976).

When Congress enacted legislation to extend phasing appropriations for an additional three years, the House report accompanying Public Law 93-328, (2 U.S. Code Congressional and Administrative News 3408) stated:

> Congress wisely relinquished the responsibility for setting postal rates under the Postal Reorganization Act of 1970. However, Congress in no way gave up its right to set the basic policies which are involved in ratemaking. The right to set governmental policy is, above all fundamental to the operation of any legislative body. This legislation involves ratemaking policies and is an exercise of Congress' Constitutional power and responsibility.
>
> Extensive testimony was taken on the impact of the rate increases for magazines, newspapers, material mailed by non-profit organizations, books, sound recordings, and other educational materials on both the mailer and the public at large.
>
> Of particular, but by no means exclusive, concern was the impact on small regular rate

publications, nonprofit publications, and libraries and educational institutions.

However, the issue goes far beyond the economics of the situation. Historically, the rates for these classes of mail have been kept low to encourage the free flow of ideas throughout the country and to help promote charitable causes. In the days when the printed word was the only source of universal communication, this policy was of paramount importance to the functioning of our democracy. Today, other forms of communication such as radio and television are on the ascendency. This in no way reduces the crucial importance of the material affected by this legislation to our educational, cultural, and eleemosynary interest.

The House report, *supra,* continues (2 U.S. Code Congressional and Administrative news 3410):

Congress historically provided lower rates for the classes of mail included in this bill in order to provide, at reasonable cost, the means for wide dissemination of educational, cultural, literary, and charitable materials. This policy was extended, in admittedly a different form when the Postal Reorganization Act provided for phasing periods. S.411, therefore, is completely consistent with both past and present Congressional policy.

There is nothing in the bill which sets postal rates; nothing which dictates to the Postal Rate Commission or the Postal Service what must be charged for any specific class of mail. *This legislation will strengthen the policy already intrinsic in the Act, that certain types of mail have*

> *intrinsic value because of their contribution to the flow of opinion and information essential to the functioning of our democracy.* [Emphasis added.]

The second class rate was continued in the mail classification schedule which PRC, along with the USPS Board of Governors, established in 1976 pursuant to § 3623 of the Act. The conditions of entry for second class include a requirement that periodicals have at least an average of 25% editorial content. The requirements were identical to the second class requirements previously established by Congress in former 39 U.S.C. § 4351-4354, (1964 ed.), and are substantially the same today.

On July 6, 1979, appropriations for regular rate second class periodicals ceased, as scheduled. The policies laid down by Congress continued. Both USPS and PRC sought to apply the eight non-cost factors within the strictures imposed by the Bazelon Per Curiam opinion in *NAGCP I.* This was accomplished by both USPS and PRC judgmentally assigning lower overhead costs to second class mail, in accordance with Congressional policy never repealed and frequently reaffirmed.

USPS and PRC policy was based on 39 U.S.C. § 3622(b)(8)[1], which codified the educational, scientific, cultural and informational value to the recipient of the mail as one of the criteria both the PRC and USPS must take into account in establishing rates.

As stated by the PRC in its February 19, 1981 Recommended Opinion and Decision in R80-1, R.2-391:

[1]In 1976 Congress enacted § 3622(b)(8) so that the PRC would specifically consider the educational, cultural, scientific and informational value of the mail. The legislative history of that amendment which is elaborated below in the agrument, shows that periodicals were specifically included in the scope of the 1976 amendment.

"We find that this factor [§ 3622(b)(8)] *requires* us to mitigate the cost coverage for this class." [Emphasis added.]

C. The Current Rate Structure of Second Class Reflects Its Informational Value As Well As Its Cost.

The second class rate is made up of three components which, when added up, establish the cost per second class copy. The rate design reflects not only cost but also the value of the content of all second class periodicals, large and small. It encourages the widest possible geographic distribution of editorial information.

These are the elements of the second class rate design as shown in the USPS rate request in R80-1 (Schedule B4, R.4-13):

(1) There is a uniform flat pound rate which does not increase with distance, which is applied to the *editorial* portion of a periodical. In other words, like a first class letter[2], a pound of editorial (non-advertising) content costs the same to mail whether it travels from New York to Connecticut or from New York to San Francisco.

---

[2]In R77-1, the rate case preceding R80-1, PRC rejected a proposal by USPS to tie editorial content to distance travelled. In its opinion, the PRC stated at Vol. I, p. 350:

> Editorial matter has traditionally been treated as having very high informational, cultural and educational value, and any proposed change which would tend to discourage its distribution must be disfavored on § 3622(b)(8) grounds. *In our opinion, what shifts the balance decisively against the proposed zoning of editorial matter in this proceeding is the prospect of detrimental impact upon small publications which are mailed to the distant zones.* [Emphasis added.]

(2) The next element in the composite second class rate is the advertising portion of the periodical. This portion of the periodical pays varying pound charges escalating upward through each of eight zones. Zones 1 and 2 (which have identical advertising rates) are fifty and one hundred fifty miles, respectively. Zone 8 represents 1,800 miles and beyond, with zones 3 to 7 rising in between.

The record in R80-1 showed that the average smaller circulation periodical travelled a distance of 1,000 miles, which is Zone 5. As shown below, there is a distinct difference in the rate paid per copy by smaller circulation periodicals and mass circulation periodicals as recognized by PRC in R77-1 (*supra* note 2, p. 6).

(3) The third composite in the second class rate is a piece charge which applies to every second class periodical. If publishers are able to bundle six or more copies to the same five digit zip code post office, a 1.6 cent per piece discount applies. If publishers are large enough to bundle six copies to carrier routes, a 2.6 cents per piece discount applies. Although all periodicals which have second class permits are eligible for the discounts, larger circulation periodicals, because of their greater density of circulation (16,000,000 copies per month for the *Reader's Digest,* for example, as compared with an average of 56,000 copies per month in ABP periodicals), are able to take advantage of the discounts, whereas the economics of publishing limit the ability of smaller circulation periodicals to do so. (R.6-1678.)

Thus, the second class rate design is a blend of a piece charge to which discounts apply, an editorial content flat rate, and an escalating advertising zone rate which applies unequally to smaller circulation periodicals which have to use all eight zones as compared with mass circulation

periodicals which rarely travel beyond the much more economical Zone 3.

D. Nationally Circulated Smaller Periodicals Depend Exclusively On the Postal Service.

In its opinion, R.2-388, the PRC recognized the dependence which smaller circulation periodicals have on USPS for transportation and delivery, when it stated:

> ANPA Witness Faraci of the *Journal of Commerce,* MPA Witness Cohen of the *New Republic* and NNA Witness Leggett of the *Ord Quiz* have all stated that there is no viable alternative to the Postal Service for their publications. The *Ord Quiz* serves a sparsely populated area of Nebraska while the other two publications are national in scope. For these publications the Postal Service provides a highly valuable service. Without it, the publications might cease to exist. ANPA Witness Hanscom of the *Bangor Daily News* and NNA Witness Moore of the Army Times Publishing Company testified that higher rates for second class may cause them to look elsewhere for delivery since alternatives might become affordable. However, Mr. Moore stated that at present postal delivery was less expensive than alternative delivery. At present, these publications have no economically viable alternative to the Postal Service.

The same reliance on exclusive USPS delivery by smaller circulation periodicals was provided in the ABP Postal Survey presented by expert Witness James B. Kobak in R.6-1670-71. The Associate Publisher and General Manager of the *New Republic* testified that smaller cir-

culation journals of opinion like the *National Review* had no alternate delivery option. Jt.App. 140(a)-141(a), R.18497-99.

E. Circulation Size In Second Class Directly Affects The Postal Cost Per Copy of Second Class Periodicals.

The average ABP periodical has a circulation of 56,000 copies per issue (R.6-1670). This compares to the circulations of well known larger circulation periodicals like *Reader Digest* (16,000,000 copies monthly, R.5-9446); *Time* (4,155,646 copies weekly, R.6-1630) and *The Wall Street Journal* (1,700,000 copies daily, R.5-8483).

The *Atlantic Monthly* is an example of a non-business smaller circulation national periodical that necessarily uses all eight postal zones and as a result, pays higher per copy postal rates than larger circulation periodicals.

The Treasurer of the *Atlantic Monthly* stated (R.6-1656-7):

> Testimony presented in postal rate cases has consistently shown that mass circulation periodicals are able to mail to the first three zones and not use zones 4, 5, 6, 7, and 8 at all. That is not the case with The Atlantic, because our circulation is not large enough to use alternate points of entry. Additionally, our ability to use the presort discounts is limited. Yet we are a nationally circulated periodical and like to feel we make a substantial contribution to the economic, political and literary development of the nation.

> It is beyond our understanding that the former spread of 9.9 cents between zones 1 and 8, which was increased to 14.3 cents in the last rate case, would now be increased to 21.2 cents in this case. We simply do not believe such drastic increases are caused by additional transportation costs.
>
> We hope you are able to convince the Postal Rate Commission that USPS has advanced a discriminatory proposal which once again favors mass circulation periodicals and penalizes small circulation journals whose contribution to the United States is not less than that of the mass circulation periodicals. In speaking out for the smaller circulation business periodicals which make up the membership of the American Business Press, you are indeed presenting the views of The Atlantic in regard to the advertising zone rates and based on my years in the publishing business, the views of most of the nationally circulated smaller circulation periodicals whose economics must be similar to those of The Atlantic.

The lower per copy postal rates paid by larger circulation periodicals are explained to a great extent by their use of multiple points of entry into the postal system. For example, the *Wall Street Journal* has 87 entry points into the postal system (R.5-8509); *Newsweek* has 35 (R.5-9354); and *Reader's Digest* has 20 (R.5-9439). This means that mass circulation periodicals purchase non-postal transportation to transport copies from printing plants to the post offices. They also print in multiple plants, strategically located so as to permit multiple points of entry into the postal stream. This permits avoidance of the higher zone rates, by reducing distance travelled per copy, and it expedites delivery time.

Smaller circulation periodicals, on the other hand, do not have the circulation size needed to economically purchase non-postal transportation. They must use the Postal Service for delivery, from the printing plant to the subscriber, and they rarely use multiple points of entry which permit lower postal rates per copy (R.6-1673).

F. Because Of The Strictures Of The NAGCP I Decision, Increased Second Class Rates Discriminatorily Impact On Smaller Circulation Periodicals As Compared With Larger Circulation Periodicals.

The average per copy postage paid in 1979 by ABP second class periodicals as shown in the Kobak Survey, was *16.5* cents. R.6-1670. On the other hand, the average postal revenue per copy for a typical second class periodical, as shown in the USPS Revenue and Cost Analysis for 1979, was *10.9* cents per copy. R.7-682.

Column 1 below shows the second class rate in effect at the time R80-1 commenced, Column 2 shows the rate decided by the PRC after a 20,000 page record by the PRC, and Column 3 shows the rate as changed by the Board of Governors. The rates in Column 3 as finally adopted by USPS were identical to what USPS had initially proposed.

	Column 1 RATES IN EFFECT APRIL 1, 1980	Column 2 February 1981 PRC RATES	Column 3 CURRENT RATES (Proposed by USPS and adopted September 1981)
Editorial pound rate: (cents per pound)	13.1 cents	10.6 cents	12.8 cents
Advertising Zone pound rates: (cents per pound)			
Zone 1 & 2	17.5 cents	14.2 cents	17.1 cents
3	18.4 cents	15.4 cents	18.4 cents
4	19.9 cents	17.7 cents	20.8 cents
5	22.7 cents	21.5 cents	24.6 cents
6	26 cents	25.8 cents	29.1 cents
7	29.4 cents	30.1 cents	33.4 cents
8	31.8 cents	34.8 cents	38.3 cents
Per piece charge (cents per piece)			
Level A (not presorted)	7 cents	8 cents	7 cents
Level B (6-copies presorted to 5-digit zip code)	5.4 cents	6.4 cents	5.4 cents
Level C (6-copie presorted to carrier route)	4.4 cents	5.4 cents	4.4 cents

The major change in the rates proposed and adopted by USPS was an increase in the zone rates beyond Zone 3, even though only a fraction of total second class mail uses zones 4, 5, 6, 7 and 8. R.6-1794. While USPS thought it was complying with *NAGCP I* by developing a rationale to increase second class zone rates, the impact fell hardest on a vast number of smaller circulation periodicals, as contrasted with a handful of mass circulation periodicals[3].

Nearly 75% of the costs which zone rates were supposed to recover under the USPS proposed rates were the result of so-called reasonably assignable "latent capacity" transportation costs. R.5-3533-35.

[3]The Functional Mail Flow Study, completed by USPS in 1977 at the request of the PRC as part of a series of mail classification studies, shows that *less than 200 publications out of over 36,000 second class entries mail 500,000 or more copies per issue.* The study was filed in the PRC Library as a library reference in Docket R80-1.

Latent capacity costs were defined in the hearing before the PRC as being unused capacity purchased by USPS on trucks and rail cars to meet the delivery requirements of first class letters and second class periodicals published weekly or more frequently[4]. USPS Witness Martin explained it as follows (Jt.App. 89(a), R.21270):

> Since utilized capacity costs vary directly with mail volumes, they are fully attributable to the classes and subclasses of mail utilizing that capacity. As we have seen, under current procurement methods, latent capacity costs are caused by an irregular distribution of volumes over time and place. With respect to mail volumes, latent capacity costs do not vary in any predictable manner with volume and therefore, are not attributable. As described in witness Alenier's testimony, we have classified costs which are determined to be not attributable as either institutional or reasonably assignable.
>
> The method I have employed to identify reasonably assignable costs in purchased transportation is to pose the question: 'If preferential treatment were eliminated, would non-attributable costs be reduced or eliminated?' A category of mail receives preferential transportation treatment when it routinely uses the non-local transportation services essential to achieve service standards equivalent to that of first-class mails. Therefore, categories of mail using air, inter-SCF highway and rail passenger train services receive preferential treatment in transporta-

[4]The whole question of latent capacity costs has been under review by the Board of Governors of USPS because the Second Circuit in *Time, Newsweek, ABP et al. v. USPS,* found that the zone rates the Governors implemented were not adequately explained. Case No. 81-4183 et al, decided July 9, 1982.

tion, because these are the transportation services essential to achieve first-class mail service standards.

The PRC rejected the second class rates USPS had proposed, specifically objecting to latent capacity costs on the grounds that they were not measurable and did not reflect how USPS really purchased its transportation. R.2-190-192.

The whole question of USPS transportation costs was very fuzzy during the hearing in R80-1. USPS treated all transportation costs the same, as though there was no difference between the cost of truck transportation, used for zones 1 through 4, and the cost of rail transportation, which is used for zones 4 through 8.

Rail transportation, as pointed out by ABP Witness Wieman, a former Assistant Postmaster General for Mail Processing, is less expensive than truck transportation. R.6-1794. The PRC agreed that truck transportation used in the nearby zones 1 through 4 is more costly per mile than rail transportation used in the distant zones 4 through 8. R.2-406. The whole method of assigning costs to the eight zones was dubious without the use of latent capacity, but with its use, the entire basis of the second class zone rates is even more questionable.

Nevertheless, the lower zone rates recommended by PRC in R80-1 had a short life: accepted under protest by the Governors on March 12, 1981, the rates remained in effect until November 1, 1981. During that time the Governors returned the case to the Rate Commission twice for reconsideration, primarily on the issue of whether the USPS revenue requirement was erroneously reduced by the PRC by $1 billion dollars, thus justifying an 18 cent stamp as opposed to a 20 cent stamp.

On September 29, 1981, the Governors, having rejected for the second time the PRC's reiteration of its recommended rates, exercised their authority under § 3625 of the Act: by unanimous vote, they modified the rates which had been recommended by PRC. The Governors increased the second class zone rates recommended by the PRC after the PRC had held extensive hearings. The greatest impact of the modification approved by the Governors was on smaller circulation periodicals. Included in the zone rates approved by the Governors were $35.4 million of latent capacity (unused space) costs, (R.5-7615) included so that USPS would be in compliance with the NAGCP decisions. Jt.App. 261a-262a, R.24126-27.

SUMMARY OF ARGUMENT

The Court is called on in this case to decide how over $24 billion (R.4-3) in postal costs are to be allocated among the different classes of mail. Since the passage of the Postal Reorganization Act in 1970, this question has been at the heart of all rate proceedings brought before the Postal Rate Commission and subsequently appealed to the Courts of Appeals[5].

The guidelines for postal ratemaking are found in 39 U.S.C. § 3622. The nine factors which the Postal Rate Commission is directed by law to consider are:

> (1) the establishment and maintenance of a fair and equitable schedule;

[5] *Association of American Publishers, Inc. v. Governors of the U.S. Postal Service*, 485 F.2d 768 (D.C. Cir. 1973); *National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976); *National Association of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979); *Newsweek, Inc. v. United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981).

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

The emphasis to be given to § 3622(b)(3) has been the issue upon which Judge Bazelon in *Association of American Publishers* and in *NAGCP I* held one view and

Judge Mackinnon, in his separate opinion in *NAGCP I*, along with the Second Circuit in the case at bar, hold another. Their differing opinions narrow down to one word appearing in § 3622(b)(3): "requirement". It is the position of ABP that the plain language of § 3622(b) and the legislative history of the Postal Reorganization Act demonstrate that Judge Mackinnon's views and the Second Circuit's views are correct, and the views of Judge Bazelon expressed in the Per Curiam *NAGCP I* opinion are incorrect.

ARGUMENT

A. The D.C. Circuit View Expressed By Judge Bazelon Unduly Emphasized The Word "Requirement" in § 3622(b)(3).

In a decision which over-emphasized the importance of the cost of service factor of § 3622(b)(3) as compared to the other seven ratemaking factors (now there are now nine factors as a result of Public Law 94-321, discussed *infra*), Judge Bazelon endorsed the singular postal ratemaking views of then Postal Rate Commission Chief Administrative Law Judge Seymour Wenner[6]. Judge Wenner found that the Postal Rate Commission, in the first two postal rate proceedings under the Act (Docket R71-1 and R74-1) had not adhered to the "requirement" that cost accounting principles must be used to the fullest extent possible even if the non-cost factors of § 3622(b) were negated.

[6]Since Judge Wenner left the Postal Rate Commission in 1975 at the conclusion of a case which began on September 25, 1973 and concluded on August 25, 1975 the Postal Rate Commission has dispensed with the use of administrative law judges to hear rate cases and Congress has imposed a 10 month limit on Postal Rate Commission rate cases. *See* Sec. 5 of the Act of September 26, 1976, Pub. L. 94-321 amending 39 U.S.C. § 3604.

Judge Wenner's recommendations were rejected by the PRC by a 4-1 vote. The Commission stated (Vol. I, R74-1, pp. 4-5):

> We do not, however, go beyond the available data respecting the variability of cost segments in an attempt to attribute as many dollars as possible. *We believe that the Initial Decision errs in seeking to attribute costs without adequately analyzing and implementing principles of cost variability. In particular, the Judge's arbitrary selection of a weight/space "distribution key" (i.e., a standard unit with which to spread costs), without first establishing related variability characteristics of the affected cost segment, led him to the erroneous conclusion that first-class mailers were being "taxed" for the benefit of other classes. No findings regarding alleged cross-subsidization can be made with any confidence until the Service undertakes studies concerning peaking patterns, network cost behavior, and capacity utilization.* Upon completion of such highly complex studies the proper costs of first-class mail vis-a-vis other classes will become clearer. However, pending their completion, it would be highly inappropriate to assume the existence of variable costs and select a cost distribution key without the benefit of economic analysis. Doing so could lead to a potentially inequitable rate schedule. On the basis of the attributable costs demonstrated on this record, we have no reason to find that first-class mailers are overcharged. Accordingly, it would be improper to conclude that first-class mailers are subsidizing other mailers.

The D.C. Circuit's Per Curiam opinion, 569 F.2d 583, chose the administrative law judge's approach over that of the PRC. The Court said:

> The ALJ's attribution method proceeded from a premise quite at odds with that of the Commission. Whereas the linchpin of the cost variability approach is an abiding concern for the greatest possible accuracy in measuring causation, the ALJ's alternative approach devalues somewhat the interest in utmost accuracy in order to pursue more fully the goal of maximized attribution. [Footnote omitted.]

Judge Bazelon pointed to one word, "requirement", which appears in § 3622(b)(3) as the justification for his endorsement of full cost distribution, 569 F.2d 570, 585:

> *First, unlike any of the other ratesetting factors contained in section 3622(b), subsection (b)(3) is set forth as a "requirement", a fact which suggests its special role in the Act's ratesetting scheme.*

The legislative history of the Postal Reorganization Act shows, however, that cost did not have a pre-eminence over the non-cost factors. Representative Morris Udall, one of the key House sponsors of the legislation that became the Postal Reorganization Act, and one of the House managers of the Conference Report, specifically described the role of both the cost and non-cost factors in setting postal rates. This important legislative history, which occurred after the Senate and House Conference came to an agreement, was ignored by the *NAGCP I* Per Curiam decision. The statement of Congressman Udall follows:

> In order to guarantee that these charges would be based on fair and equitable standards for each class of mail, be it for the ordinary citizen or for the big commercial mailer, we insisted that each

would pay at least the "demonstrably related costs."

This phrase, while finally deleted in the final bill, was used throughout the conference to express the feeling that each class of mail pay those direct or indirect costs attributable to it.

We agreed that the principle of the House bill be included in the final version of the legislation. This would establish a "floor" for each class or mail equal to costs called "demonstrably related costs" in the House version and "attributable costs" in the final version. Such costs consist of those costs, both direct and indirect, which vary over the short term in response to changes in volume of a particular class of which, even though fixed rather than variable, are the consequence of providing the specific class or service involved. The committee felt that such costs were capable of objective determination and proof either by empirical observation or deductive analysis. *In addition to this threshold requirement, the legislation provides for a judgmental assignment of some part of the remaining costs. The judgment as to what portion of institutional costs should be borne by each class is to be made in the light of the criteria in the bill.*

I have dwelt at length on this section because I believe it goes to the heart of what we are trying to do by giving management some responsibility and prerogatives. 116 Cong. Rec. 27606 (August 6, 1970).

B. Judge Mackinnon's Separate Opinion In NAGCP I Demonstrates Why The Per Curiam Opinion was In Error.

The separate decision, of Judge Mackinnon in *NAGCP I*, 569 F.2d 603-606, succinctly shows how the Per Curiam opinion ignored the plain language of the Postal Reorganization Act, as well as the legislative history of the Act. Judge Mackinnon stated;

> *A mere reading of this section [§ 3622(b)] indicates that Congress intended to vest a substantial discretion in the Commission* to recommend rates and fees that are "fair and equitable," that relate to the value of the postal service provided to users, and that consider competition, the effect upon the general public and business interests, the ease of handling certain mailable matter, the simplicity of the entire rate structure and such other factors as the Commission might deem appropriate. *But if the Per Curiam opinion regarding section (b)(3) is to be construed as requiring that the attribution and assignment of practically all costs be on a strained cost-of-service basis, these discretionary factors may never have any substantial effect.* How could the Commission recommend a rate for a particular class of mail that it found would be "fair and equitable" and would not adversely affect legitimate business interests if practically all the relevant costs were required to be attributed or assigned according to an almost absolute cost-of-service straight jacket? To make the seven discretionary standards meaningful Congress must have intended that there be some substantial volume of costs that are available for assignment. [Emphasis added]. 569 F.2d 604.

Judge Mackinnon correctly recognized that Congress had endowed the Postal Rate Commission with "substantial discretion" in applying the various ratemaking factors. The Commission has been frustrated, however, by *NAGCP I* in exercising its discretion to consider the nine ratemaking factors in accordance with the evidence before it.

The deference courts should show to the PRC and USPS in postal ratemaking was expressed by Judge Wyzanski in *Association of American Publishers v. Governors of the U.S. Postal Service*, 485 F.2d 768, 774 (D.C. Cir. 1973):

> Like most other factor sheets, whether in statutes, A.L.I. Restatements, or comparable compilations, the factors listed are not analogous to a table of atomic weights, or to the multiplication table. The factors are reminders of relevant considerations, not counters to be placed on scales or weight-watching machines.
>
> No one who seeks fairly and equitably to determine a complicated rate structure ought to suppose that there is a correct answer, or even that in the final mix there should have been added a specified number of spoonfuls of each of the ingredients. A conscientious, competent ratemaking body proceeds by opening its mind to relevant considerations, and closing it ears to irrelevant ones. It is governed by policies not politics.
>
> *A reviewing court under familiar jurisdictional principles may not, and under human limitations generally could not, reassess the weights given by a rate-making agency to different factors, absent a legislative directive as to precisely what gravity each factor bears. All that the court may proper-*

> *ly do is to consider whether the agency did take into account all the relevant factors and no others.* [Emphasis added.]

In its decision in Docket R77-1, issued May 12, 1978, the PRC expressed its belief that *NAGCP I* was not correctly decided, stating:

> We would mislead the reader if we left the impression that we regard *NAGCP I* as unquestionably sound and our previous methods as incompatible with the Act. On the contrary, and with all due respect to the court, we believe that the *NAGCP I* ruling was not inevitably required by the statute and has caused us difficulties in its application. Whether or not it remains the law, however, it is the law today and we are bound to follow it to the best of our ability. This opinion [the PRC's own R77-1 opinion] represents, in our view, a comprehensive and workable application of the principles of *NAGCP I,* as we understand them, to the record before us. [Footnote omitted.] Vol. I, Docket R77-1, p. 9, Opinion and Recommended Decision.

Judge Mackinnon, by a careful reading of the actual language of § 3622(b) pointed out that the word "shall" precedes *all* the ratemaking factors in § 3622(b), and therefore they are *all* requirements. Judge Mackinnon found no basis for the Per Curiam finding that the word "requirement" justifies applying cost acc nting principles to nearly all of the costs of USPS:

> This is an impermissible intrusion into the plain language of the statute, and if subsection (b)(3) is given a "plain reading," it does not require the emphasis on "cost-of-service

> principles." The Per Curiam claims this result on the basis of the legislative history, but such intent, if it exists, is very obscure, and legislative history is not properly reached because the statute plainly states that the postal rates recommendations *"shall"* also reflect the seven other factors enumerated in section 3622. *In claiming reliance on legislative history the Per Curiam opinion tries to make too much out of too little. The word "shall" at the forepart of section 3622 is just as mandatory as the word "requirement," in the same section, if not more so, since it applies to the entire section — but the Per Curiam opinion overemphasizes the latter and refuses to recognize the former.* [Emphasis added]

It is the overemphasis on the word "requirement" by the Per Curiam opinion which has lead USPS and PRC to propose attributing costs beyond levels they feel are justified. It is axiomatic that a court cannot be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy. *Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975); *Richards v. U.S.,* 369 U.S. 1, 11 (1962).

The PRC has been on the horns of a judicially created dilemma by the Per Curiam opinion. Its authority as an administrative agency to interpret the statute it administers has been unjustifiably restricted, and the right of parties to bring the eight non-cost factors to the PRC's attention for effective application has been abridged.

The PRC and USPS correctly recognize that all nine criteria must be considered, with no particular priority for cost attribution. The PRC must be able to judgmentally assign a significant segment of costs in order for the non-cost factors to have meaning. This is con-

firmed by the Report of the House Managers accompanying the Conference Report of the Postal Reorganization Act, No. 91-1363, 91st Cong. 2d Sess. (1970) at 87:

> The conference substitute adopts the Senate provision with an amendment which incorporates the standard[7] that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.
>
> The provision in the conference substitute with respect to costs attributable to a class of mail or type or service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. *In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.*

Representative Udall, when he explained the Conference Report on the floor of the House, emphasized that the PRC was to have flexibility in setting rates. 116 Cong. Rec. 27605 (August 6, 1970). He stated:

> A vital part of this bill, which goes to the very heart of postal reform, is the method of setting new postal rates. In the bill before you, we establish a Postal Rate Commission composed of five men appointed, without Senate confirma-

[7]This "standard" is the equivalent of the "demonstrably related costs" Representative Udall described and reflects the House position that only demonstrably related or attributable costs were required as a minimum. All other costs were to be judgmentally determined. The Senate Report did not specify any minimum standard at all.

tion, by the President.

> From the very beginning, there was widespread agreement between House and Senate conferees that *Congress should lay down broad policy guidelines and that we leave the application of those policies to full-time, professional rate commissioners.* It was emphasized that Congress must be taken out of the ratemaking procedure once and for all. The reason for this is clear: Fixing postal rates under intense lobbying pressures, as done in the past, produces neither fair and adequate rates, nor does much to strengthen the role of Congress. [Emphasis added.]

The foregoing demonstrates Congress' intention that the PRC should have broad discretion in applying the ratemaking criteria. The NAGCP I Per Curiam opinion conflicts with this Congressional policy, and should not be upheld by this Court.

C. Because Of NAGCP I, USPS And The Postal Rate Commission Have Been Forced To Adopt Cost Allocations Not Supported By Reality.

The next rate case to reach the District of Columbia Circuit was Docket R77-1 (the D.C. Circuit had been hearing *NAGCP II,* the appeal of Docket R76-1, but this was mooted by the R77-1 appeal). Reviewing R77-1, the D.C. Circuit reaffirmed the Wenner-Bazelon view that cost of service was the overriding consideration in establishing postal rates. *National Association of Greeting Card Publishers v. United States Postal Service,* 607 F.2d 396 (D.C. Cir. 1979) (*NAGCP III*).

NAGCP III is primarily relevant to the instant case because it demonstrates the extreme methodologies USPS

and PRC had to unwillingly reach for and invent in order to comply with the *NAGCP I* decision. USPS proposed, and PRC adopted, service-related costing which the *NAGCP III* described as follows:

> . . . Postal Service witness Jellison, the Assistant Postmaster General for Mail Processing, testified on the differences in service standards. Jellison first ranked the priorities of treatment given the various classes of mail . . . Jellison concluded that because of the deferrability feature, nonpreferential service standards could be met by delivery every other day, as opposed to the current six-day delivery schedule. In his view, were it not for the existence of preferential mail, a three-day delivery system with recipients receiving mail every other work day would be feasible.

It is illustrative of the havoc which this confusion has wreaked upon postal ratemaking, that (1) *USPS proposed* service-related costs, in R77-1 (2) *the Commission adopted* them because it felt compelled by *NAGCP I* to do so, (3)*the Governors implemented* rate increases in R77-1 based on service-related costs and (4) in the April 1980 rate filing, *USPS repudiated* service related costs as being totally unrelated to the way USPS actually works.

The latest USPS position on service related costs was expressed by its Governors (whose agency had invented service related costs originally) when they accepted the PRC's R80-1 rates under protest on March 10, 1981, stating:

> No one who is informed on postal matters can seriously suppose that the Postal Service would make regular deliveries only three days a week if a few paragraphs concerning priorities were cut

out of some internal operating instructions. Yet, without precisely this supposition, the whole "service-related cost" methodology is meaningless. *Reasoned decisionmaking cannot tolerate the assignment of over $1.8 billion on the basis of such a transparent fiction.*

In this connection, we reiterate our statament in our May 19, 1978, Decision in the last general rate case (R77-1) concerning the importance of pricing principles that give due weight to the non-costing ratemaking factors in the Act:

> In referring to our previous expressions of approval of much of the Commission's earlier opinions, we include reference to the Commission's development of costing and pricing principles in the second and third rate cases. To a substantial extent, these principles have been drawn in question by the Decision of the U.S. Court of Appeals in *National Association of Greeting Card Publishers v. United States Postal Service,* 569 F.2d 570 (D.C. Cir., 1976). In this connection, we strongly endorse the Commission's views on the bearing of the Court's Decision in *NAGCP I* on this proceeding; we agree with the Commission's statement that it does not intend its departure in this case to imply a desire to abandon that methodology; *and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.* Decision of Governors, March 10, 1981, p. 15.

Nevertheless, in its attempt to comply with NAGCP I, as described in the Statement of the Case, *supra,* USPS in

R80-1, invented "latent capacity" transportation cost similar to service-related costs. A memorandum filed by USPS Counsel in R80-1, (Jt. App. 255a, 2416), stated:

> As will emerge more fully from a reading of this memorandum, *the Postal Service believes that, although NAGCP I is now the prevailing interpretation of section 3622(b), that case was wrongly decided. Our filing which launched this docket follows the dicta of NAGCP I.* For the information of the Commission and the parties, therefore, we are filing concurrently with this Memorandum a document which will trace the effects upon rates of the interpretation of section 3622(b) which we believe to be the correct one. (Emphasis added.]

The issue which this Court can resolve once and for all in this case, is whether cost inventions are necessary in the name of § 3622(b)(3) and *NAGCP I.* The Second Circuit has correctly stated that the Bazelon Per Curiam opinion is in error in compelling PRC and USPS to impose extreme cost attribution methods like service-related costs. *Newsweek v. USPS, supra* at 1201.

D. Since Passage Of The Postal Reorganization Act, Congress Has Repudiated Cost Alone As A Requirement, Both Before and After NAGCP I.

In addition to ignoring the word "shall" prefacing § 3622(b), the Per Curiam opinion gave no weight to the § 101(a) of the Act which states:

> (a) The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, and efficient services to patrons in all areas and shall render postal services to all communities. *The costs of establishing and maintaining the Postal Service shall not be apportioned to impair the overall value of such service to the people . . .*
>
> * * *
>
> *(d) Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis.* [Emphasis added.]

Judge Bazelon's decision guts § 101 by enabling an army of accountants, economists, econometricians, lawyers, and expert witnesses to troop through the Postal Rate Commission with regularity and engage in endless debates about cost accounting theories while ignoring the social, educational and cultural value of the mail to the public, and the duty of USPS to maintain a nationwide postal service to all communities, large and small, as mandated by Congress (presently six days per week, nationally). *See* § 1722 of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 357, Public Law 97-35, 97th Cong. 1st Sess. The purpose of § 101 was to assure that USPS fulfilled its traditional role of serving all communities at reasonable rates, even where cost alone would not justify service.

The Senate Report accompanying S.3842, the Senate version of the Postal Reorganization Act, contained the following language which was incorporated in part into § 101:

> S. 3842 is no halfway measure. Its objective is to establish a postal structure and a method of operating that will entrust the management of the U.S. postal service, within broad policy guidelines designed to protect the ordinary mailer, to responsible public officials whose authority derives from the President. *The committee reports the bill with the reminder to present and future posta! managers that the system will work only if the public interest is kept as the paramount criterion in every decision made. Congress, in its multiplicity of views and in the diversity of its concerns, is no longer the appropriate governing body for the postal service. But Congress has served the people well by protecting their interests over the years and by recognizing the reliance of grassroots America on the Post Office.* In proposing to relinquish as much control as this bill would vest in the new Board of Governors of the U.S. Postal Service, the committee believes the intention of Congress should be clearly expressed; that postal managers should follow, quite literally, the policy section of the bill which begins, *"The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people."* [Emphasis added.] Report No. 91-912, 91st Cong. 2d. Sess. (1970) at 3.

Congress has not flinched from its policy that USPS is to be operated as a basic service to the people and not as a

guinea pig for judicial or administrative cost accounting experimentation. On September 29, 1975, the full House of Representatives *rejected* an amendment to § 3622(b)(3) proposed by Representative Patricia Schroeder, which would have codified the Wenner-Bazelon philosophy. *See* House Comm. on Post Office and Civil Service, *H.R. 8603 Postal Reorganization Act Amendments of 1976, Legislative History,* Committee Print No. 94-20, 94th Cong., 2d Sess., 134 (1976).

The purpose of the Schroeder amendment was to increase the level of attributable costs to 70 to 80 percent from the 50 to 55 percent that the PRC had determined to be fair and equitable. *Id.* at 135. The House of Representatives' rejection of the Schroeder Amendment reflected Congressional intent not to increase attributable costs beyond the levels recommended by the PRC in past rate cases. Thus the position which United Postal Service (UPS) and the National Association of Greeting Cards Publishers (NAGCP) take in the case at bar was rejected by Congress.

In 1976, § 3622(b) was amended by the addition of a ninth factor for ratemaking when Congress amended 39 U.S.C. § 3622(b) (*see* Act of September 24, 1976, Pub. L. 94-421, § 10; 90 Stat. 1311) by adding subsection (8) to the criteria which the Postal Rate Commission must consider in setting rates. The new section directed the PRC to consider:

> ". . . (8) the educational, cultural, scientific, and informational value to the recipient of mail matter;. . . ."

The sponsor of § 3622(b)(8), Representative Ford, stated:

> Existing law does not require the Postal Rate Commission to consider the subjective values of the various kinds of mail in recommending postal rates. The law is designed to accomplish that in mail classification proceedings, but those proceedings have progressed so very slowly that the postal rates may go through the roof before the Postal Rate Commission ever gets around to deciding that a book, a magazine, or a newspaper have more intrinsic value to the public than a brick. They may all have the same shape, size, and weight, but they are not all the "same." The conference report includes a new criterion which *requires* that the Postal Rate Commission take into account the "educational, cultural, scientific, and informational value of mail matter in fixing postal rates. [emphasis added)

Legislative History, H.R. 8603, supra, at 551.

Not only did Congress put the word "shall" in front of the seven non-cost criteria to underscore their equal importance in assigning costs, as Judge Mackinnon correctly pointed out, but the subsequent legislative history of § 3622(b)(8) uses the word "requires" to illustrate that it is a compulsory factor.

Thus Congress had an opportunity to change the postal ratemaking criteria to conform to what the Chief Administrative Law Judge and Judge Bazelon thought the Act required, but Congress rejected the Schroeder amendment and therefore rejected the rationale of NAGCP I. Concurrently, Congress re-affirmed the importance of the non-cost factors when it enacted § 3622(b)(8) *after* rejecting the Schroeder amendment. This Congressional interpretation is consistent with the PRC and USPS interpretations of the Act.

In these circumstances, the PRC and USPS interpretations of § 3622(b) should be free from undue judicial interference: ". . .an agency's longstanding construction of its statutory mandate is entitled to great respect, 'especially when Congress has refused to alter the administrative construction.' " *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

E. The Second Circuit Interpretation of § 3622(b), Like Judge Mackinnon's, Is The Correct Interpretation.

In *Newsweek v. USPS*, the Second Circuit took a fresh look at § 3622(b) and confirmed what Judge Mackinnon had discovered five years earlier: that postal rates ought to be established by the Postal Rate Commission's consideration of *all nine factors of § 3622(b) and not just one factor, cost*. The *Newsweek* court stated, 663 F.2d at 1196:

> Despite the consistent interpretation accorded to section 3622(b) by the PRC and the Board in the first three rate-making proceedings, the D.C. Circuit chose to reject the two-step cost allocation analysis in favor of its three-tier approach. The NAGCP I and NAGCP III panels based their decisions upon the plain language of the statute and found support for their interpretation in the legislative history of the Act. *We conclude that the D.C. Circuit failed to give sufficient deference to the agency's own interpretation of the statute, misread the plain language of section 3622(b) and misconstrued the legislative history of that section." [Footnote omitted.]*

In the *Newsweek* opinion Judge Meskill, (who was a member of the House Post Office and the Civil Service Committee in 1970 at the time the Postal Reorganization Act was passed), provided a thorough review of recent cases of this Court which admonish courts to accord great deference to an agency's own interpretation of its enabling act. *Newsweek* at 1196-97. In postal ratemaking, this means letting the PRC independently consider each of the nine criteria.

If cost alone were the criterion for setting postal rates, a computer could probably do the job better than an administrative agency, Congress, the courts or anyone else. However, Congress provided for full public participation in postal rate hearings, together with the appointment of an Officer of the Commission (OOC) to represent the interests of the public. 39 U.S.C. § 3624. There would be little point in having in-depth hearings unless non-cost factors such as fairness and equity, and the informational value of the mail to the public are given significant importance.

Like Judge Mackinnon five years earlier, the Second Circuit stresses that § 3622(b) means that the Commission "shall" consider all the ratemaking factors set forth in § 3622(b). *Newsweek* at 1197 stated:

> . . .The court (the D.C. Circuit), however, neglected to mention that section 3622(b) states that the PRC "shall" consider all of the section's enumerated factors and places no special emphasis upon subdivision (3) other than by inserting the word "requirement" in that subdivision. But that alone, we think, is too tenuous a ground upon which to base such an expansive interpretation of that provision. Indeed, had Congress in-

> tended primary importance to attach to that factor, we think that, at the very least, it would have been placed at the top of the list of factors. We believe that the true genesis of the D.C. Circuit's construction lay not in the plain language of the statute or underlying intent of Congress, but rather in the opinion of the PRC's Chief Examiner in R71-1, who stated, 'The paragraph as a whole suggests that assignment of costs was to be carried out as far as it reasonably could be.'

The Second Circuit accurately notes that the root of the problem is the opinion of the Chief Administrative Law Judge opinion in the first postal rate case, which was endorsed by Judge Bazelon in *NAGCP I,* and by the United Parcel Service (UPS) and NAGCP in the case at bar. Deference however should be given to the PRC, which overruled Judge Wenner.

In R80-1 (R. 2-801-803), the present PRC, (none of the members of which were on the Commission when the Wenner recommendations were rejected) again repudiated the theories of the Chief Administrative Law Judge. The *present* Commission describes these theories, which UPS and NAGCP would have this Court embrace, as producing "patently absurd results." R. 2-803.

The PRC has pointed out that the Law Judge's methods are out of touch with reality. (R. 2-807):

> The differing impacts on labor time devoted to different classes implicit in the law judge's distribution of other-street-time costs are truly staggering. The judge's allocations imply that it takes a city delivery carrier over 236 times as long to carry a parcel along his route as it does to carry a letter.

ABP believes the Second Circuit's thorough analysis of the legislative history of the Act, 663 F.2d 1198-200, comports with what actually happened[8] as oposed to the selective history set forth by UPS and NAGCP. Neither the House nor the Senate intended to impose an unrealistic cost standard on the PRC. The Bazelon opinion which ignores eight of the nine factors that the PRC must consider, is the type of "judicial intervention run riot", which this Court emphatically rejected in reversing the D.C. Circuit's unwarranted interference with the Nuclear Regulatory Commission in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 556 (1978). *See also, Strycker's Bay Neighborhood Council, Inc. v. Karlen,* 444 U.S. 223, 227-8 (1980).

F. The Impact Of Second Class Zone Rates Proposed By USPS In R80-1 Falls Hardest On Smaller Circulation Periodicals.

ABP's Statement of the Case, *supra*, demonstrates that smaller circulation periodicals distributed nationally rely exclusively on USPS for delivery. Smaller circulation periodicals do not use multiple points of entry because they cannot economically purchase non-postal transportation. As a result, they pay higher per copy second class

---

[8]The *Newsweek* opinion cites the Senate Report at S. Rep. No. 91-912 at 15 (1970) to show "that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its increment cost." Judge Wenner, Judge Bazelon, NAGCP and UPS all cite the Senate version of the Postal Reorganization Act as the basis for a cost-based approach. This is incomprehensible given the foregoing Senate report language which was specifically directed *against* UPS' proposal for fully-distributed costs, which UPS unsuccessfully advanced before both the House and Senate Post Office Committees in 1969 and 1970 during hearing on the Postal Reorganization Act.

rates than larger circulation periodicals because they use and pay for all eight zones. This would be true even without the extreme cost attribution required by the D.C. Circuit. The disparity however is greater because USPS assigned $35.4 million of latent capacity transportation costs (R. 5-7615) to second class mail. Even though these costs do not vary with either volume or distance, USPS proposd that they be recouped by increasing second class zone rates, which do increase with distance. (R.3533-35.)

Smaller circulation periodicals are the primary users of zone 4 through 8 rates. Under the methodology for "reasonably assignable" costs developed by USPS for R80-1, these periodicals will bear the greatest burden of paying for non-attributable costs they did not cause (R.3533-35). The sole reason these costs were developed was to satisfy the mandate of *NAGCP I* that there must be a category of "reasonably" assignable costs. (Jt. App. 255(a), R.24116.)

The record shows that USPS has had a hard enough time in ascertaining *actual* attributable costs for the transportation and delivery of second class periodicals, let alone transportation costs for empty space. (R.2-406-7.) The PRC directed USPS in R80-1 to develop better data in determining its *actual* costs of transporting mail to the distant zones, data USPS did not have in R80-1. Because of *NAGCP I,* USPS transportation experts spent their time estimating the cost of transporting mail which never rode a rail car, truck or airplane, instead of ascertaining the real costs of transporting *actual* mail volume. Smaller periodicals will find themselves further burdened with arbitrarily calculated transportation costs if this imaginary costing system continues.

G. The Extreme Cost Attribution Positions Of The United Parcel Service And The National Association Of Greeting Card Publishers Should Be Rejected.

UPS and NAGCP wholeheartedly endorse the Administrative Law Judge-Per Curiam philosophy. NAGCP attached a portion of the ALJ's opinion to its brief. (NAGCP Appendix 2). NAGCP and UPS allege that first class will pay "what the traffic will bear" if cost is not the predominant factor in setting postal rates. See UPS Brief, pp. 42-44.

UPS, of course, desires to raise parcel post rates out of further sight, and the greeting card publishers, whose cards costs more and more, want postage for these cards to cost less and less. Gone is the day of the nickel cigar, the penny post card, and the 25 cent greeting missive.

ABP maintains, however, that *it is smaller circulation second class periodicals that will have to pay what the traffic will bear* if USPS and PRC lose their discretion to judgmentally assign costs. R80-1 shows that when USPS is forced to search for cost distribution keys, like empty cubic space in trucks, the rate impact falls hardest on those smaller circulation publishers who *must* use the entire USPS transportation network. Those periodicals happen to comprise the great preponderance of periodicals mailed in the United States. (*supra*; footnote 3, p. 12)

The fact is that it is *first class* volume which is *growing* and *second class mail* that is *declining* (1981 Annual Report of the Postmaster General). It is *fourth class* parcel post volume that is *declining* and *UPS* volume which is

growing.[9] UPS' claim of unfair competition from USPS is ludicrous.

As Judge Mackinnon rightly pointed out, the *NAGCP* Per Curiam decision would read the non-cost factors of § 3622(b), including § 3622(b)(8), out of the Act. 569 F.2d 604. Both Judge Mackinnon and the Second Circuit recognize that it is the *PRC* and not the courts that should decide the importance of each factor.

This Court can restore the usurped authority of USPS and the PRC by affirming Judge Mackinnon and the Second Circuit's opinion in *Newsweek v. USPS* and overturning the erroneous Per Curiam decision of *NAGCP I.*

---

[9]The 1981 Annual Report of the Postmaster General, p. 26, shows a 1.9% increase in first class mail in 1981 from 1980, a 2.5% decline for second class, and a 6.3% drop for fourth class mail. UPS' volume has increased from 930 million packages to 1,437,000,000 from 1975-79 (Jr. App. 249(a), R.12856).

CONCLUSION

Respondent American Business Press respectfully asks this Court to affirm the decision of the United States Court of Appeals for the Second Circuit in *Newsweek v. USPS*, 663 F.2d 1186 (1981), and thus reverse the Per Curiam opinion of the United States Court of Appeals in *National Association of Greeting Card Publishers v. USPS*, 569 F.2d 570 (1976).

Respectfully submitted,

Robert A. Saltzstein
Counsel of Record
Stephen M. Feldman
Joseph J. Saunders

WYATT AND SALTZSTEIN
1725 DeSales Street, N.W.
Washington, D.C. 20036
(202) 638-4485

September 7, 1982

Respondent's Brief

3

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents,

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT DOW JONES & COMPANY, INC.

RAYMOND N. SHIBLEY
Counsel of Record
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

W. GILBERT FAULK, JR.
DOW JONES & COMPANY, INC.
Post Office Box 300
Princeton, New Jersey 08540
Counsel for
Dow Jones & Company, Inc.

September, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Section 3622(b) of the Postal Reorganization Act requires usage of cost-of-service principles to the maximum extent possible, thereby emphasizing only one of the nine statutory factors?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Statutory Scheme for Setting Postal Rates	4
B. History of Cases That Construed Section 3622(b)	5
C. Proceedings Below	7
ARGUMENT	13
I. THE COURT SHOULD AFFIRM THE SECOND CIRCUIT'S JUDGMENT BECAUSE IT IS CONSISTENT WITH THE STATUTE AND ITS LEGISLATIVE HISTORY AND DEFERS TO THE AGENCY'S CONTEMPORANEOUS CONSTRUCTION OF ITS ENABLING ACT	13
A. Great Deference Is Due to an Agency's Construction of Its Enabling Statute	13
B. Section 3622(b) of the Postal Reorganization Act Does Not Require Use of a Three-Tier Cost Structure	16
C. The Legislative History Supports the Postal Service's Interpretation of the Statute	19
II. AFFIRMANCE OF THE JUDGMENT OF SECOND CIRCUIT IS IN THE PUBLIC INTEREST	35
III. THE SERVICE-RELATED COST ALLOCATION FORMULA IS THE PRODUCT OF THE D.C. CIRCUIT'S HOLDINGS; THE VALIDITY OF THAT METHODOLOGY SHOULD NOT BE ADDRESSED BY THE COURT AT THIS TIME	38
CONCLUSION	38

TABLE OF AUTHORITIES

Cases: Page

Association of American Publishers, Inc. v. Governors of United States Postal Service, 485 F.2d 768 (D.C. Cir. 1973) 5, 15, 19, 34
Bindczyck v. Finucane, 342 U.S. 76 (1951) 24
Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169 (1961) 32
Cannon v. University of Chicago, 441 U.S. 677 (1979) 34
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981) 13
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978) 16
National Association of Greeting Card Publishers v. United States Postal Service, 569 F.2d 570 (D.C. Cir. 1976) (*per curiam*), *vacated as to other issues*, 434 U.S. 884 (1977) ..... *passim*
National Association of Greeting Card Publishers v. United States Postal Service, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) ..... *passim*
Newsweek, Inc. v. United States Postal Service, 663 F.2d 1186 (2d Cir. 1981), *cert. granted*, 102 S.Ct. 1969 (1982) ..... *passim*
North Haven Board of Education v. Bell, 102 S.Ct. 1912 (1982) 32, 34
Power Reactor Development Co. v. International Union of Electrical, Radio, & Machine Workers, AFL-CIO, 367 U.S. 396 (1961) 19
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 34
Time, Inc. v. United States Postal Service, No. 81-4183, *et al.* (2d Cir. July 9, 1982) 12, 15
Towne v. Eisner, 245 U.S. 418 (1918) 18
Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976) 20
Udall v. Tallman, 380 U.S. 1 (1965) 11, 13, 19
United States v. American Trucking Associations, 310 U.S. 534 (1940) 18
United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805) 32

TABLE OF AUTHORITIES—Continued

	Page
Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981)	16
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	11, 13
Statutes:	
28 U.S.C. § 1254(1) (1976)	2
Postal Reorganization Act of 1970, 39 U.S.C. § 101 *et seq.* (1976 & Supp. IV 1980), P.L. No. 91-375, 84 Stat. 719, § 2	2
39 U.S.C. § 201 (1976)	4
39 U.S.C. § 202 (1976)	4
39 U.S.C. § 2401(c) (1976)	33
39 U.S.C. § 3524 (1976)	33
39 U.S.C. § 3601 (1976)	4, 33
39 U.S.C. § 3621 (1976)	4
39 U.S.C. § 3622(a) (1976)	5
39 U.S.C. § 3622(b) (1976)	*passim*
39 U.S.C. § 3622(b)(3) (1976)	*passim*
39 U.S.C. § 3622(b)(8) (1976)	34
39 U.S.C. § 3625(a) (1976)	4
39 U.S.C. § 3625(c)(2) (1976)	8
39 U.S.C. § 3626 (1976)	33
Pub. L. No. 94-421, 90 Stat. 1311, §§ 7, 10 (1976)	34, 35
Miscellaneous:	
Executive Order 11570, 35 Fed. Reg. 18,183 (1970)	33
39 C.F.R. Part 3000	33
116 Cong. Rec. 20,455 (1970)	24
116 Cong. Rec. 20,456 (1970)	25
116 Cong. Rec. 20,458 (1970)	25
116 Cong. Rec. 21,707-18 (1970)	27
116 Cong. Rec. 22,049-74 (1970)	27
116 Cong. Rec. 22,279-346 (1970)	27

TABLE OF AUTHORITIES—Continued

	Page
116 Cong. Rec. 26,954 (1970)	34
116 Cong. Rec. 26,955 (1970)	34
116 Cong. Rec. 27,605 (1970)	33
116 Cong. Rec. 27,606 (1970)	31, 32
121 Cong. Rec. 30,777-84 (1975)	34
122 Cong. Rec. 29,747-48 (1976)	34
H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970)	24
H.R. Rep. No. 1363, 91st Cong., 2d Sess. (1970)	29, 30
S. Rep. No. 912, 91st Cong., 2d Sess. (1970)	27, 28, 29, 33
S. Rep. No. 1244, 95th Cong., 2d Sess. (1978)	37
Evaluation of the Report of the Commission On Postal Service: Hearings Before the Subcommittee on Energy, Nuclear Proliferation and Federal Services, 95th Congress, 1st Sess. (1977)	37
Post Office Reorganization: Hearings Before the House Committee on the Post Office and Civil Service, 91st Cong., 1st Sess. (1969)	22
Postal Modernization: Hearings Before the Senate Committee on the Post Office and Civil Service, 91st Cong., 1st Sess. (1969-70)	28
Postal Rates and Revenue and Cost Analysis: Hearings Before the House Subcommittee on Postal Rates, 91st Cong., 2d Sess. (1970)	23
Postal Service Amendments of 1978: Hearings Before the Senate Subcommittee on Energy, Nuclear Proliferation, and Federal Services on S. 3229 and H.R. 7700, 95th Cong., 2d Sess. (1978)	37
Report of the Committee on Postal Service (1977)	35, 36
The Postal Service Act of 1977: Joint Hearings Before the Subcommittee on Postal Operations and Services and the Subcommittee on Postal Personnel and Modernization, 95th Cong., 1st Sess. (1977)	37
Sutherland, 2A *Statutory Construction* (1973)	24
Towards Postal Excellence: The Report of the President's Commission on Postal Organization (1968)	14, 20, 21, 23, 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 81-1304 and 81-1381

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents,

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF RESPONDENT DOW JONES & COMPANY, INC.

OPINION BELOW

The opinion of the Court of Appeals, appearing in Appendix A to the petition of National Association of Greeting Card Publishers ("NAGCP") in No. 81-1304, is reported at 663 F.2d 1186. Rehearing was denied on January 11, 1982. *See* Appendix D to the Petition of United Parcel Service of America, Inc. ("UPS") in No. 81-1381.[1]

---

[1] Throughout this brief, references to "App. A", "App. B", or "App. C" will be to the Appendix in No. 81-1304. Reference to "App. D" will be to the Appendix in No. 81-1381.

JURISDICTION

This Court has jurisdiction in these cases under 28 U.S.C. § 1254(1) (1976). The petitions were filed within ninety days of the denial of rehearing in the Court of Appeals.

STATUTE INVOLVED

Section 3622(b) (39 U.S.C. § 3622(b)) of the Postal Reorganization Act of 1970, as amended,[2] ("the Act") reads in its entirety as follows:

> Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;
>
> (5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

---

[2] 39 U.S.C. § 101 *et seq.* (1976 & Supp. IV 1980). Any reference in this Brief to a statutory section will be to the Postal Reorganization Act.

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

STATEMENT OF THE CASE

In a series of decisions reviewing postal rates since the enactment of the 1970 Act, all previous opinions were issued by the District of Columbia Circuit, until the instant case was decided by the Second Circuit. The Second Circuit's opinion squarely conflicts with the prior opinions of the D.C. Circuit on the central issue of statutory ratemaking principles. In order to present the basic question in the context of the proceeding below, it is necessary to describe the statutory scheme and the manner in which the Courts of Appeals have construed the rate standards of Section 3622(b).

Dow Jones & Company, Inc. was an active participant in the proceeding below. Its primary interest in postal rate matters involves second class postal rates and classifications. Dow Jones publishes *The Wall Street Journal*, a daily newspaper with the largest circulation of any daily newspaper in the country. J.A. at 129a.[3] *The Wall Street Journal* is one of the largest users of second-class mail. Dow Jones also publishes other newspapers and periodicals that rely on second-class mail for delivery.

---

[3] References to "J.A." are to the Joint Appendix.

Before turning to the statutory scheme and the cases that have construed Section 3622(b), it should be noted that the briefs of Petitioners and Intervenor Direct Mail/Marketing Association, Inc. ("DMMA") deal not only with the statutory issue, but also numerous highly complex issues of ratemaking methodology that need not be resolved by the Court for the proper disposition of these cases. The essential question posed by these cases is the proper interpretation of Section 3622(b). The split between the Second Circuit and the D.C. Circuit over that question requires this Court's resolution. We respectfully submit that the Court need not and should not concern itself with the methodology or formulae for setting postal rates after resolving the statutory construction question. Rather, it can leave the selection and application of ratemaking techniques to the Postal Service and the Postal Rate Commission ("PRC") once the question of statutory interpretation is settled.

A. Statutory Scheme for Setting Postal Rates.

The postal system is comprised of two independent executive agencies. The first of these agencies is the United States Postal Service, which is governed by a Board of Governors ("Board"). 39 U.S.C. §§ 201-02 (1976). The other agency is the PRC. 39 U.S.C. § 3601 (1976).

The process for setting postal rates requires action by both agencies. The Board has the power "to establish . . . reasonable and equitable rates of postage and fees for postal services." 39 U.S.C. § 3621 (1976). However, the Board is limited (with exceptions not here relevant) to approving, rejecting, modifying, or allowing under protest recommendations of the PRC. 39 U.S.C. § 3625(a) (1976). By contrast, the PRC may not initiate a rate proceeding on its own. Instead, the PRC must await a

"request" from the Board. 39 U.S.C. § 3622(a) (1976). *See generally Newsweek Inc. v. United States Postal Service*, 663 F.2d 1186, 1190-91 (2d Cir. 1981).

B. History of Cases That Construed Section 3622(b).

In *Association of American Publishers, Inc. v. Governors of United States Postal Service*, 485 F.2d 768 (D.C. Cir. 1973), the D.C. Circuit was faced with the question of the proper interpretation of Section 3622(b). The Postal Service and PRC had interpreted that section simply to set forth the relevant considerations for rate-making, with none predominant. The Court of Appeals (per Judge Wyzanski) affirmed. However, in a concurring opinion of Chief Judge Bazelon, in which the other two members of the panel joined, the Postal Service and PRC were admonished that Section 3622(b)(3), was, in the panel's view, the "most concrete" of the statutory subsections.[4] *Id.* at 777. Chief Judge Bazelon's concurring opinion stressed the view that postal rates were to be set according to cost-of-service principles to the fullest extent possible. The concurring opinion stated that there was "a strong indication" that Congress intended such a result. *Id.* at 779. The Postal Service was given more time, however, to accumulate the necessary experience to do so.

In *National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976 (*per curiam*), *vacated as to other issues*, 434 U.S. 884 (1977) (*"NAGCP I"*) the court observed that

> The foundation of both [of Petitioner's] arguments is the assertion that the Act imposes a special obligation that allocation in accordance with cost-of-

[4] The concurring opinion also stated that "Section 3622(b)(3) is susceptible of a variety of interpretations, as all parties to this proceeding have recognized." *Id.* at 779 (footnote omitted).

service principles be carried out as far as reasonably possible. In *American Publishers* we found "a strong indication" that Congress intended to impose just such a special obligation.[53] In that case, however, in view of "the presumptions that surround an initial effort to formulate rates" we found it unnecessary to go beyond a mere preliminary assessment of the import of subsection 3622(b)(3).[54]

In this case, now that the Commission has had some five years of experience with the Act, the formidable task of definitively interpreting subsection 3622(b)(3) may no longer be deferred.

---

[53] 157 U.S.App.D.C. at 408, 485 F.2d at 779. In that case we were confronted with a methodology not significantly different from that presently before us. We observed there the Commission's initial response to the concrete requirements of subsection 3622(b)(3) appeared "questionable at best." *Id.* at 406, 485 F.2d at 777.

[54] *Id.* at 408, 485 F.2d at 779. As we observed there, "Section 3622(b)(3) is susceptible of a variety of interpretations." *Id.*

569 F.2d at 584-85. After extended discussion, the Court held that the statute requires "that in setting postal rates every reasonable effort be made to employ cost-of-service principles to the fullest extent possible." *Id.* at 593 (footnote omitted). To support its interpretation of Section 3622(b), the D.C. Circuit concluded that postal costs should be "attributed" *and* "reasonably assigned" according to cost-of-service principles. The remaining "institutional" costs were to be allocated by application of the other eight criteria of Section 3622(b). This is sometimes referred as "three-tier" cost allocation. Throughout this Brief, references to maximum use of cost-of-service principles and three-tier cost allocation are used interchangeably as shorthand for the D.C. Circuit's interpretation of Section 3622(b). "Two-tier" cost allocation is a shorthand reference for the interpretation of the Second Circuit in the decision under review. *See Newsweek*, 663 F.2d at 1193-94.

In *National Association of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) ("*NAGCP III*") the Court of Appeals adhered to its holding in *NAGCP I* and affirmed the Postal Service's "service related cost" methodology adopted in response to the mandate in *NAGCP I*. *Id.* at 396-97. There were two opinions for the Court in *NAGCP III*. Judge Leventhal's opinion for the Court affirmed the *NAGCP I* holding that the statute requires the application of "cost-of-service ratemaking principles to the greatest extent possible." *Id.* at 400. However, Judge Tamm's opinion for the Court stated that

> *NAGCP I* and section 3622(b)(3) do not require myopic and exclusive adherence to principles of cost-justification, while recklessly ignoring the impact of rates on the other factors enumerated in section 3622(b).

Id. at 434.

C. Proceedings Below.

On April 21, 1980, the Postal Service (through the Board) "requested" a recommended decision on changes in postal rates. That action initiated a proceeding denominated R80-1, the fifth general ratemaking proceeding since the enactment of the Act in 1970. The Second Circuit summarized the Postal Service's request as follows:

> The Postal Service had determined that an annual revenue requirement of $22.9 billion was necessary for the "test year" beginning March 21, 1981 and ending March 20, 1982. The Postal Service had also determined that its proposed rates and fees would increase postal revenues by $3.75 billion annually, The Postal Service requested the PRC to recommend specific changes in hundreds of rates for classes and subclasses of mail and in certain fees. The "request"

> was accompanied by testimony of eleven witnesses and thousands of documents.

Newsweek, 663 F.2d at 1191 (footnote omitted). The PRC conducted extensive hearings and sent its recommended decision to the Postal Service on February 19, 1981. As the Second Circuit described the recommended decision,

> [t]he recommendation included a staggering $1 billion reduction in the Postal Service's proposed general revenue requirements and major changes in cost distribution and in the rates compared with those proposed by the Postal Service.

Id. at 1192. The Board was dissatisfied with the PRC's recommendation. It allowed the decision to take effect under protest, pursuant to Section 3625(c)(2). Never before had the Board failed to accept the PRC's initial recommended decision in a ratemaking proceeding. The Second Circuit described the Board's action as follows:

> The Board stated in its decision that the PRC's decision set rates and revenues so low that the Postal Service might have to borrow funds to meet its obligations. Furthermore, the Board claimed that the decision would require that more frequent rate proceedings be conducted, which would destabilize postal rates. The Board also implied that the PRC lacked authority to scrutinize or adjust general revenue requirements. Nevertheless, the Board allowed the rates to go into effect, albeit under protest, "because of the Postal Service's urgent need for revenues."

Id. (footnote omitted).

In the proceeding below, the PRC's recommended decision followed the interpretation of Section 3622(b) adopted in *NAGCP I* and *NAGCP III*. As the Second Circuit put it, the PRC chose the "judicially sanctioned road" rather than adopting the Postal Service's method, which the PRC felt provided "no basis for abandoning

an approach to cost tracing that the court of appeals has found acceptable.' " *Id.* at 1202.

The Postal Service argued before the PRC that the D.C. Circuit erred in its analysis of Section 3622(b) and that the PRC should follow the postal agencies' earlier interpretation of Section 3622(b). J.A. at 259a-261a. The Postal Service noted that in Docket No. R77-1, the PRC itself stated:

> We do not intend any departure here from our R76-1 method to imply that we desire to abandon that method. We continue to believe that the departures required by the Court [of Appeals] are not required by the Act, and are difficult to implement on economic grounds.

J.A. at 260a. In its subsequent acceptance of the PRC's decision in Docket No. R77-1, the Board stated:

> [W]e agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

Id. Although the Board allowed the PRC's recommended rates to go into effect in Docket No. R80-1, it expressed its adamant disapproval of the "service-related" costing methodology used to "assign" over $1.8 billion of unattributable postal costs to certain preferred categories of mail. The Board noted that the entire concept depended on the assumption that, but for the priority accorded preferred categories of mail, the Postal Service would adopt a three-day-a-week schedule. It called that assumption "patently unrealistic" and a "transparent fiction", and then stated:

> In this connection, we reiterate our statement in our May 19, 1978 Decision in the last general rate

case (R77-1) concerning the importance of pricing principles that give due weight to the non-costing ratemaking factors in the Act:

> In referring to our previous expressions of approval of much of the Commission's earlier opinions, we include reference to the Commission's development of costing and pricing principles in the second and third rate cases. To a substantial extent, these principles have been drawn in question by the Decision of the U.S. Court of Appeals in *National Association of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570, (D.C. Cir. 1976). In this connection, we strongly endorse the Commission's views on the bearing of the Court's Decision in *NAGCP I* on this proceeding; we agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

App. B at 13b-14b.

In the proceeding to review the Board's decision in the Second Circuit, the Postal Service opposed the D.C. Circuit's interpretation of Section 3622(b), and advocated that it be interpreted to result in a two-tier allocation of postal costs, with none predominant. As the Second Circuit (per Meskill, J.) put it,

> Several parties argue that the rates are unlawful because they are based upon an incorrect interpretation of 39 U.S.C. § 3622(b) that was foisted upon the postal system by the Unitel States Court of Appeals for the District of Columbia Circuit. [citing *NAGCP I* and *NAGCP III*].

663 F.2d at 1190 (footnote omitted). The Second Circuit observed that

> In the first three general rate proceedings under the Act, the PRC and the Board were in agreement as to the meaning of section 3622(b). *See* Docket Nos. R71-1, R74-1, and R76-1. Both read the provision to require a two-step process for allocating postal costs. The first step consisted of determining which costs were directly or indirectly attributable to a specific mail class or service based upon volume variability, and allocating these attributable costs to the specific class or service. Approximately half of the postal system's costs were determined to vary with the volume of mail and were therefore found "attributable" within the meaning of section 3622(b)(3) (as it was then interpreted). The second step was to treat the remaining costs of the postal system as "institutional" and judgmentally "assign" them to the various mail classes and services on the basis of elasticity of demand and, ostensibly, on the basis of the non-cost factors listed in section 3622(b).

Id. at 1193. The Second Circuit stated that:

> We conclude that the D.C. Circuit failed to give sufficient deference to the agency's own interpretation of the statute, misread the plain language of section 3622(b) and misconstrued the legislative history of that section [in *NAGCP I* and *NAGCP III*].

Id. at 1196. After referring to the deference this Court required to be given to any agency's interpretation of its enabling act in *Udall v. Tallman*, 380 U.S. 1, 16 (1965), the Second Circuit cited this Court's opinion in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) for the propositions that courts are to refrain from areas entrusted to agency discretion and expertise and that policy questions that are the province of Congress and the state legislatures "are *not* subject to re-examination in the federal courts under the guise of judicial review of agency action." 663 F.2d at 1196-97 (citing *Vermont Yankee* at 558). The Second Circuit then stated:

> We believe that the D.C. Circuit's decisions in *NAGPC I* and *III* reflect a patent disregard both for

> the latter considerations and for the statutory limitations on the scope of judicial review imposed by 39 U.S.C. § 3628 (1976) and 5 U.S.C. § 706 (1976). It is our opinion that the D.C. Circuit erroneously supplanted the PRC's "reasonable" construction of section 3622(b) with its own interpretation.

Id. at 1197. The Second Circuit concluded that the PRC was free to follow either the ratemaking methodology ("service related costs") that was "foisted" upon it by the D.C. Circuit or

> it may, if it wishes, return to the methodologies used in the first three ratemaking proceedings or develop alternative methodologies which comport with the requirements of section 3622(b), as we interpret it.

Id. at 1211. Rehearing was denied on January 11, 1982. This Court granted certiorari on April 19, 1982, and consolidated Nos. 81-1304 and 81-1381. 102 S.Ct. 1969.

After Petitioners and Intervenor DMMA filed their opening briefs, the Second Circuit issued an opinion in *Time, Inc. v. United States Postal Service*, No. 81-4183, *et al.* (2d Cir. July 9, 1982), in which the court addressed the lawfulness of certain Board modifications to postal rates recommended by the PRC in a subsequent phase of PRC Docket No. R80-1. In that opinion, the Second Circuit (per Meskill, J.) adhered to its opinion in *Newsweek*, as to the statutory interpretation issue presented here; held that the Board failed to provide the full explanations for its rate modifications; concluded that the Board has not as yet articulated sufficient reasons for its rejection of the service-related cost methodology; and held that the Board exceeded its authority in setting permanent third class bulk rates. The court remanded to the Board and invited it to request a fourth recommended decision from the PRC, which has not, since the decision in *Newsweek*, had an opportunity to recommend postal rates to the Board without the constraints imposed by *NAGCP I* and *NAGCP III*.

ARGUMENT

I. THE COURT SHOULD AFFIRM THE SECOND CIRCUIT'S JUDGMENT BECAUSE IT IS CONSISTENT WITH THE STATUTE AND ITS LEGISLATIVE HISTORY AND DEFERS TO THE AGENCY'S CONTEMPORANEOUS CONSTRUCTION OF ITS ENABLING ACT.

A. Great Deference Is Due to An Agency's Construction of Its Enabling Statute.

In *Udall v. Tallman*, 380 U.S. 1 (1965), this Court stated that:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n of Territory of Alaska v. Aragon 329 U.S. 143, 153 . . . [additional authorities omitted]. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are untried and new.'" Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408 . . .

Id. at 16; *see also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 102 S.Ct. 38, 46 (1981). The Second Circuit, in the decision under review, was faithful to this Court's holdings. The D.C. Circuit, in *NAGCP I* and *NAGCP III*, was not.

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58

(1978), this Court admonished the D.C. Circuit that policy questions are to be resolved by Congress and the state legislatures in their respective roles. Here, Congress has enacted a statute that *requires* the PRC to consider *nine* factors, only *one* of which (Section 3622(b)(3)) is cost-related. The use of the word "shall" to describe the consideration the PRC must give to the nine factors of Section 3622(b) contemplates equivalent consideration of *each* of the factors. The elevation of one of those factors to a position of paramount importance and to the virtual exclusion of the other eight factors disregards clear Congressional intent that all nine factors "shall" be considered.

The unreasonableness of an interpretation of Section 3622(b) that requires use of cost-of-service ratemaking to the maximum extent possible is illustrated by the degree to which postal costs have been "attributed" and "reasonably assigned" (both according to cost-of-service principles). As noted in the UPS Brief at 43, 50% of postal costs were "attributable" in Docket No. R71-1.

However, because of the D.C. Circuit's holdings, about 75% of all postal costs are distributed among the various mail classes in accordance with cost-of-service principles under Section 3622(b)(3) *alone*, leaving only one-quarter of those costs to be assigned in accordance with the other *eight* factors in Section 3622(b). This is an absurd result, and ignores the Congressional intent to give significant weight to those other eight factors. *See infra.* Moreover, even this extreme result might not be adequate to satisfy the D.C. Circuit in the future. *NAGCP III*, 607 F.2d at 411.

As noted *infra*, the *Report of the President's Commission on Postal Organization* ("the Kappel Report") estimated that the institutional costs of the Postal Service, which are to be "assigned" in accordance with the non-cost criteria of Section 3622(b), "represent between 40%

and 50% of total postal costs." Leg. Hist. at 019.[5] The Postal Service's "attribution" of 50-60% of postal costs in the first three general rate increase proceedings (Nos. R71-1, R74-1, and R76-1), leaving 40-50% of postal costs to "assign" as institutional, is consistent with the Kappel Report's estimate. Continuation of postal ratemaking under the D.C. Circuit's interpretation would return the Postal Service to the same trap as the under the discredited Cost Ascertainment System. *See infra* at 20.

The Postal Service and PRC, in the first three general rate increase proceedings, were in agreement that Section 3622(b) did not require use of cost-of-service principles to the fullest extent possible. J.A. at 258a-261a; *Newsweek*, 663 F.2d at 1196 & n.7. Both held that a two-tiered costing methodology with the non-"attributable costs assigned by application of the factors in Section 3622(b)(1)-(2) and (4)-(9) was appropriate and consistent with the statute. *Id.* The D.C. Circuit should have deferred to that construction of Section 3622(b).[6]

---

[5] "Leg. Hist." is a citation to the "Joint Appendix of Relevant Legislative Material" filed by the Postal Service with the Court.

[6] Deference to the agencies' construction of Section 3622(b) was particularly appropriate after the D.C. Circuit had concluded that Section 3622(b)(3) "is susceptible of a variety of interpretations." *Association of American Publishers*, 485 F.2d at 779 (concurring opinion of entire panel).

Petitioner UPS argues that, "[t]o the extent deference may be owed to any agency in the interpretation of the ratemaking provisions of the Act," deference should be accorded to the interpretation of the PRC, and not the Postal Service. UPS Brief at 32. Intervenor DMMA argues that the PRC "is the body to whom Congress delegated the authority to implement the statutory standards." DMMA Brief at 12 n.17. However, the Second Circuit in *Time* has subsequently held that the Postal Service's views are also entitled to deference. Slip op. at 19; *accord*, *NAGCP I*, 569 F.2d at 595 n.110 ("due deference"). Certainly, the fact that the Postal Service is a litigant in these cases is no reason to deny it that deference. *Compare* UPS Brief at 32. Indeed, it is customary for an agency to be a litigant on appellate review of its decisions.

B. Section 3622(b) of the Postal Reorganization Act Does Not Require Use of a Three-Tier Cost Structure.

The starting point in determining the type of cost allocation that Congress intended is, of course, the language of the statute. *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771 (1981); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). Section 3622(b)(3) provides:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> * * * *
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type. . . .

The language of Section 3622(b)(3) contemplates that postal costs will fall into two categories: "the direct and indirect postal costs attributable to that class", and "that portion of all other costs of the Postal Service reasonably assignable to such class or type." In other words, Section 3622(b)(3) contemplates traditional ratemaking principles that "attribute" costs that vary with the level of output or service, and that "assign" costs that may not be "directly" or "indirectly" "attributable" to such level of output or service. But Section 3622(b) does not impose public utility cost of service ratemaking principles; it also requires that the other eight factors contained therein be taken into account.

The D.C. Circuit construed Section 3622(b)(3) as requiring the use of cost-of-service principles to the maximum extent possible, through use of a three-tier methodology. *NAGCP I*, 569 F.2d at 586-88. It expressly re-

jected the two-tier construction of Section 3622(b)(3) on which the Postal Service and the PRC had theretofore relied. *Id.* at 592. As the Postal Service put it in its Brief to the Second Circuit:

> Instead of classifying costs as either attributable or nonattributable, the court created a three-tier structure of attributable, residual, and, as an in-between category, assignable costs. This new third class of costs was to consist of more "speculative" costs and would be determined with greater amounts of estimation, judgment, and discretion than would be necessary for the identification of attributable costs. [569 F.2d] at 587. The court was adamant, however, that what it had now labeled "assignable costs" must be allocated in accordance with cost-of-service principles, even if this required the use of less reliable procedures, such as accounting formulae. *Id.* at 586.
>
> The ultimate purpose of this type of analysis was to severely curtail the exercise of discretion within the postal ratesetting process which, according to the court, was a primary goal of the legislative reformers. *Id.* at 588.

"Brief for Respondent United States Postal Service", July 13, 1981 (at 15); *see also* J.A. at 255a-267a. The D.C. Circuit's interpretation of Section 3622(b) is clearly inconsistent with the language of that section, which allocates costs in two categories by "attribution" and "assignment."

The D.C. Circuit characterized Congress' intention in drafting Section 3622(b)(3) in the following passage:

> Giving the statute a plain reading it seems clear that the first of the subsection's dual requirements calls for something more than minimal attribution. Had Congress intended, for instance, that cost variability be acceptable as an exclusive method for identifying attributable costs, it in all likelihood would not have given seemingly equal importance to the

> attribution of indirect, as of direct, postal costs. Strictly speaking, indirect costs may not be attributed by cost variability, at least not by short-term variability; rather, attribution of such costs as a practical matter necessitates the use to some degree of cost allocation formula based on accounting principles.[57]

---

[57] See 1 A. Kahn, *The Economics of Regulation: Principles and Institutions* 78 (1970).

569 F.2d at 585-86. The D.C. Circuit was of the view that "[s]trictly speaking, indirect costs may not be attributed by cost variability, at least not by short-term variability".[7] But consistency with traditional economic theory is not the test for construing a statute. Rather, Congressional intent is paramount. *United States v. American Trucking Associations*, 310 U.S. 534, 542 (1940). As the Postal Service said in its Brief in the Second Circuit:

> Whether what Congress said makes "strict" economic sense, Congress did make quite plain that short-term cost variability was the method prescribed for identifying the direct *and indirect* attributable costs which are volume variable. The court cannot substitute its own procedure for allocating such costs. Nor can the court claim, as it seems to be doing at this point in its *NAGCP I* opinion, that, it knew better than Congress what Congress itself intended.

Postal Service Brief at 16. Congress plainly intended that costs be placed in one of two categories and that, depend-

---

[7] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918) (Holmes, J.). *See* discussion of legislative history, *infra* at 30-32, for a demonstration that Congress did indeed intend "direct and indirect costs" to mean those costs "that vary over the short term", contrary to the D.C. Circuit's conclusion.

ing on the category, those costs be either "attributed" or "assigned". It was error for the D.C. Circuit to create a third category of costs and require that those costs be "attributed" as well.[8]

Assuming *arguendo* that Section 3622(b) can be construed to *permit* the interpretation that the D.C. Circuit required in *NAGCP I* and *NAGCP III*, the Second Circuit's judgment should be affirmed. When the Court is faced with a statute that (as the D.C. Circuit itself conceded in *Association of American Publishers*) "is susceptible of a variety of interpretations", the proper course is to defer to the agency's construction of its enabling act. *Udall v. Tallman*, 380 U.S. at 16-18. As the Second Circuit properly noted, since Section 3622(b) *may* be read to permit the interpretation that the Postal Service and the PRC followed in the first three general rate increase proceedings, the Court should not impose on those agencies another construction of the statute, but should defer to the interpretation of the agencies contemporaneous with the statute's passage. 663 F.2d at 1201; *Power Reactor Development Co. v. International Union of Electrical, Radio, & Machine Workers, AFL-CIO*, 367 U.S. 396, 408 (1961).

C. The Legislative History Supports the Postal Service's Interpretation of the Statute.

When Congress enacted the Act, Congress did not intend to bind the Postal Rate Commission to any particular methodology for allocating postal costs. The legislative

---

[8] It is noteworthy that Petitioner NAGCP does not support a three-tier construction of the statute, and Intervenor DMMA advocates a two-tier construction, while Petitioner UPS argues that the D.C. Circuit's interpretation should be upheld. NAGCP's acknowledgment that a three-tier construction of Section 3622(b)(3) is "difficult to implement" and might, if carried to its logical extreme, "leave nothing to 'reasonably assign' on a cost-of-service basis" (Brief at 18) is correct, and good reason to reject the D.C. Circuit's interpretation.

history[9] demonstrates that Congress intended that rates for each class would, at a minimum, recover its incremental costs (i.e., that those costs would be "attributed" to the particular class). Beyond that, Congress intended that the remaining institutional costs would be apportioned (i.e., "assigned") among the classes in accordance with the factors set forth in Section 3622(b). The intent of Congress in 1970 can best be understood by first reviewing what caused Congress to enact the Postal Reorganization Act of 1970.

1. *The Kappel Commission's Report on the Post Office Department's Role in Postal Ratemaking.*

In 1966, President Johnson appointed a commission, headed by Mr. Frederick R. Kappel, the former chairman of the board of American Telephone & Telegraph Company, to study all aspects of the postal system and to recommend appropriate changes.

The Kappel Commission prepared an extensive study entitled *Towards Postal Excellence, The Report of the President's Commission on Postal Organization* (June 1968), which became the foundation of the Act. J.A. at 264a; *see Newsweek*, 663 F.2d at 1200 n.10. The matter of postal cost allocation and ratemaking was a major focus of the Kappel Commission's study and recommendations.

The Kappel Report was highly critical of the "Cost Ascertainment System" theretofore used by the Post Office Department, essentially because it emphasized unduly the type of cost of service of service accounting concepts that the D.C. Circuit seemingly requires. Report at 29-31, 132-35; Leg. Hist. at 003-006; 020-023. The Commission explained that it erroneously relied on "broad averages . . . [which] blur vital distinctions" between

---

[9] Legislative history may always be consulted to aid in construction of statutes. Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 9-11 (1976).

the different types of mail. Report at 135; Leg. Hist. at 023. The Commission recommended that the Post Office should move away from "rigid accounting allocations and now take service and market considerations as well as cost into account". Report at 31; Leg. Hist. at 005.

The Kappel Report recommended that each class should "cover the costs *demonstrably related* to [it]", (Report at 61, Leg. Hist. at 006), or "the full *additional* costs of providing the service" to the class (*id.*), or "the actual cost of providing *the specific service*" to the class as opposed to "institutional postal costs" (Report at 130; Leg. Hist. at 018) (emphases added).

The Report further explained that the institutional costs "would not be apportioned to the several classes of mail by rigid accounting formulas" (Report at 62, Leg. Hist. at 007) which were "inherently arbitrary" (Report at 131; Leg. Hist. at 019) but "rather . . . on the basis of its judgment of such market factors as differences in the nature of various services provided and differing demand characteristics" (Report at 62; Leg. Hist. at 007). The Report added:

> Determining and assigning variable costs is a technical job for the accountant, economist and engineer; fixed cost assignment, on the other hand, can only be guided by market and economic studies, and the range for management judgment is wide.

Report at 133; Leg. Hist. at 021. The Report estimated that "institutional costs . . . represent between 40% and 50% of total postal costs." Report at 131; Leg. Hist. at 019.

2. *Legislative History of the 1970 Act.*

In 1969, a bipartisan measure, "The Postal Service Act of 1969", H.R. 11750, 91st Cong., 1st Sess., was introduced. H.R. 11750 was introduced in the House by Representative Morris Udall and a number of other Representatives from both parties. Leg. Hist. at 214.

In 1970, H.R. 17070 was introduced as a substitute for H.R. 11750. However, the ratemaking provisions of the two bills were identical. Leg. Hist. at 216, 220. H.R. 17070 was eventually adopted by the House of Representatives.

The House bills contained a minimum rate floor in Section 1201(c), which provided that a new postal ratemaking authority would:

> . . . establish rates and fees for each such class of postal service *so that at least those costs demonstrably related to the class of service in question will be borne by each such class* and not by other classes of users of postal services or by the mails generally.

Leg. Hist. at 216, 220 (emphasis added). As we proceed to show, the House minimum rate floor was the genesis of Section 3622(b)(3), which demonstrates that what was intended by Congress was that a minimum rate floor be adopted, and not that the cost-of-service principles govern to the maximum extent possible.

"Demonstrably related" costs were defined by Assistant Postmaster General Hargrove of the Bureau of Finance and Administration. He testified that the demonstrably related costs for a class would be

> . . . some number less than fully allocated costs. They would be those costs which you could prove are specifically related to this particular class of mail. . . . Generally speaking, it would be comparable to what we would call incremental costs, Congressman. However, there are some costs which are indirect in nature that can be demonstrably shown to be related to a particular class. So that this type of an indirect cost, if demonstrably related to a class, would also be included in the floor that we are talking about.

Post Office Reorganization: Hearings Before the House Committee on the Post Office and Civil Service, 91st

Cong., 1st Sess. 342 (hereinafter "House Hearings");[10] Leg. Hist. at 063.

The testimony of Postmaster General Blount paralleled that of Mr. Hargrove. Noting that the Post Office Department was in the process of replacing the outmoded "Cost Ascertainment System" with a new cost accounting system based on the "incremental cost" for each category of service (House Hearings at 184; Leg. Hist. at 057), the Postmaster General stated that "demonstrably related" costs were synonymous with the new accounting system (House Hearings at 210; Leg. Hist. at 058; *see also* House Hearings at 183-84; Leg. Hist. at 056-057).[11]

Postmaster General Blount also testified that, under Section 1201(c), rates would be established on the basis of "what some people call the incremental cost or demonstrably related cost as a minimum that can be charged in any class." House Hearings at 359; Leg. Hist. at 064.

In the report of the House Committee on the Post Office and Civil Service on H.R. 17070, the Committee noted that Title I of the bill, including Section 1201(c), was "basically consistent with the recommendations of the President's Commission on Postal Organization (the Kap-

---

[10] Demonstrably related costs were also defined as:

> Those costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.

Postal Rates and Revenue and Cost Analysis: Hearings Before the House Subcommittee on Postal Rates, 91st Cong., 2d Sess. 75 (1970); Leg. Hist. at 130. Institutional costs were defined as "the total costs of the postal service, less demonstrably related costs." *Id.*

[11] At times, the Postmaster General used the terms "directly related costs" and "directly attributable costs" as synonymous with "demonstrably related costs." House Hearings at 183-84, 210; Leg. Hist. at 056-058. This demonstrates the interchangeability of the concepts.

pel Commission)." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 6 (1970). Leg. Hist. at 270.[12] The House Report stated that each class of mail "is to bear as a minimum the costs demonstrably related to providing service to that class." Report at 40; Leg. Hist. at 287.

During the House debates on H.R. 17070, an amendment with respect to parcel post (fourth class) rates was considered. At that time, Section 1201(f) of H.R. 17070 provided that:

> Notwithstanding any other provision of this title, fourth-class parcel post service shall bear, in addition to those costs demonstrably related to such service under subsection (c) of the section, such portion of all other costs incurred by the Postal Service (including, without limitation, costs described in the second sentence of subsection (b) of this section) as will assure that the revenue of such service will not be less than the costs thereof, determined under this subsection, by more than 4 per centum and will not be greater than the costs thereof by more than 4 per centum.

Leg. Hist. at 342. Representative Johnson of Pennsylvania offered an amendment to strike Section 1201(f). 116 Cong. Rec. 20,455 (1970); Leg. Hist. at 343. He explained his amendment as follows:

> We are now establishing a new Postal Service to establish a new organization to run the Post Office into the next century. *I do not feel that the rate board should have their hands tied with respect to any class of mail.*
>
> *Now this provision singling out fourth-class mail is totally inconsistent with the rest of the bill.* It will unfairly burden the parcel post for ratemaking purposes and will tend to price it out of the market, contrary to the public interest.

---

[12] *See* Sutherland, 2A Statutory Construction, § 48.11 (1973); Bindczyck v. Finucane, 342 U.S. 76, 79-80 (1951).

> *The full allocation of all costs,* as prescribed now under this bill, to fourth-class mail *will mean the rate board will have to overlook the value of the service, the availability of alternative service, the elasticity of demand, the quality of service and would eliminate all the discretion entirely of the rate-makers.*
>
> * * * *
>
> Give this postal reform system a chance. *Do not put a strait jacket on this rate board.* Let them fix the rates on fourth-class mail.

Id. (emphases added).

Representative Edward Derwinski supported the Johnson amendment. 116 Cong. Rec. at 20,456; Leg. Hist. at 344. Derwinski noted that the requirement for fully allocated costs in Section 1201(f) would "impede the flexibility" in ratemaking (*id.*). He added that "[t]here is no reason to single out fourth-class mail for specific restrictions from which first-, second-, and third-class mail in this bill are excluded." 116 Cong. Rec. at 20,458; Leg. Hist. at 346.

The amendment striking Section 1201(f) was approved (*id.*), and Section 1201 was adopted by the House without further modification.

In 1970, Senators McGee and Fong introduced S. 3842 as a substitute for S. 3613, an earlier postal reform bill. The ratemaking criteria of S. 3842 were contained in Section 3704(g), which read as follows:

> The Commission shall recommend a decision to the Board on changes in rates of postage and fees for postal services to provide sufficient revenue so that total estimated income and appropriations will equal as nearly as possible estimated total costs. The Commission shall make a recommended decision for changes in rates or fees in each class of mail or type of service, other than those for which appropriations are provided in section 2501(b)(3) of this

title, in accordance with the postal policy contained in section 101(a) and (c) of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services; and

(8) such other factors as the Commission deems appropriate.

Compare 39 U.S.C. § 3622(b) at 2; Leg. Hist at 262-264.

The Senate Committee Report on S.3842 addressed Section 3704(g)'s eight ratemaking criteria and noted that in establishing rates, the PRC would be required to give

"careful consideration" to each of those factors. S. Rep. No. 912, 91st Cong., 2d Sess. 14 (1970); Leg. Hist. at 307. The Senate Report stated that:

> In discharging the highly important responsibilities vested in the Commission, *it must exercise its best judgment* to insure that all postal rates, fees, and classifications are reasonable and equitable, and to insure that the rights of all mail users are protected, throughout the ratemaking and classification process, *by careful consideration of all the specific public interest factors that the statute requires be taken into account, and by faithful adherence to all of the ratemaking and classification standards set forth in the statute.*

Id. (emphases added). The Report emphasizes that the PRC "must" take each of the specified ratemaking factors into account when it establishes postal rates (Senate Report at 15; Leg. Hist. at 308).

Following debate, the Senate adopted S.3842 as reported by the Committee on the Post Office and Civil Service and without any modification to Section 3704(g). 116 Cong. Rec. 21,707-18, 22,049-74, and 22,279-346 (1970); Leg. Hist. at 349-353. The Senate Report indicates that the Senate, as had the House, relied on the Kappel Report. S. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970); Leg. Hist. at 295.

The Senate Report does not support the view that consideration of the non-cost factors in Section 3704(g) were to be relegated to a small "residuum of cost", if any, that might remain if the PRC were required to use average cost-based formulae or "distribution keys" in order "to allocate all costs . . . to the fullest extent reasonably possible." *See* Senate Report at 13-16; Leg. H at 206-309; *compare NAGCP I*, 569 F.2d at 585-87. In fact, the Senate Report expressly rejects that interpretation, in the context of the Report's discussion of parcel post rates.

As noted above, a number of private express companies had urged that the ratemaking provisions of any postal reform legislation should require that parcel post rates be based on fully allocated costs.[13] The Senate rejected proposals that would have required fully allocated costing for fourth class mail. *See Postal Modernization: Hearings Before the Senate Committee on the Post Office and Civil Service*, 91st Cong., 1st Sess. 685-90, 692, 701-03, 708, 713, and 732-34 (1969-1970); Leg. Hist. at 172-186. The Senate Committee Report demonstrates that, in S.3842, the Senate rejected fully allocated costing not only for fourth class, but for *every* class of mail. The Report states:

> Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. *The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost.* That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law. [Those] criteria for ratemaking include seven specific requirements, among them, the effect of rate increases upon "enterprises in the private sector of the economy engaged in the delivery of mail other than letters." To go beyond that point would simply be to recommend provisions of law protecting a particular economic interest or limiting the availability of a Federal parcel delivery service.

S. Rep. No. 912, at 17; Leg. Hist. at 310 (emphasis added).

---

[13] H.R. 17070 contained such a provision in the version reported out of Committee, but that provision was stricken during floor consideration.

Despite the above-quoted language, the *NAGCP I per curiam* opinion states:

> Under this provision [*i.e.*, Section 3704(g)(3)], each mail class or postal service, in addition to bearing "operating costs"—which one might reasonably equate with attributable costs—would also have been *required to bear some portion of "overhead" and "other institutional costs of the Postal Service"* at least to the extent that a cause and effect relationship between those costs and the mail class or postal service to which they are to be assigned *could properly be determined. See* S. Rep. 91-913, 91st Cong., 2d Sess. 15 (1970); *see also id.* at 10.

569 F.2d at 586 n.59 (emphasis added). Pages 10 and 15 of the Senate Report (Leg. Hist. at 303, 308) in no way support the Court of Appeals' conclusion. Furthermore, the Court of Appeals ignored the statement at page 17 of S. Rep. No. 912[14] that "no particular classification of mail is required to recover a designated portion of its cost beyond incremental cost." This language refutes the D.C. Circuit's conclusion.

In conference, the "demonstrably related" cost provision of Section 1201(c) of H.R. 17070 and the "properly assignable" cost standard in Section 3704(g)(3) of the Senate bill were merged in the conference substitute. The eight factors in the Senate bill were incorporated therein, with the merged provision becoming the present Section 3622(b)(3). The Conference Report (H.R. Rep. No. 1363, 91st Cong., 2d Sess. (1970)) describes Section 3622(b) as follows:

> The House bill contained provisions requiring that (1) rates be established in such a manner so as to apportion the costs of all postal operations on a fair and equitable basis, and (2) rates for each class of postal service cover the demonstrably related cost of such service. The Senate amendment also contained

---

[14] The Court of Appeals' reference to S. Rep. No. 913 should have been to S. Rep. No. 912.

> the requirement that postal rates be established in such a manner so as to apportion the costs of all postal operations on a fair and equitable basis, and provided several additional standards to be considered in making rate determinations. The conference substitute adopts the Senate provision *with an amendment which incorporates the standard that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.*

Conference Report at 87; Leg. Hist. at 334 (emphasis added). This language demonstrates that, contrary to the *NAGCP I* court's belief (569 F.2d at 588-89), the House minimum rate floor, and not the Senate bill, was the genesis of the Act's "requirement" language in Section 3622(b)(3). The non-cost factors in S. 3842 were included in Section 3622(b) as factors that the Commission "shall" consider. The Conference Report goes on to state that:

> The provision in the conference substitute [Section 3622(b)(3)] with respect to costs attributable to a class of mail or type or [sic] service *establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved.* In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.

Conference Report at 87; Leg. Hist. at 334 (emphasis added).[15]

---

[15] The Conference Report thus defined attributable costs in Section 3622(b)(3) in the same way as had the PRC in Docket No. 74-1, *i.e.*, volume variable costs plus fixed costs that are consequence of providing "the specific service involved." *But see NAGCP I*, 569 F.2d at 590-92 & n.91.

One of the Conference Managers, Representative Udall, described Section 3622(b)(3) in the post-conference floor debate as follows:

> In order to guarantee that these charges would be based on fair and equitable standards for each class of mail, be it for the ordinary citizen or for the big commercial mailer, we insisted that each would pay at least the "demonstrably related costs."
>
> This phrase, while finally deleted in the final bill, was used throughout the conference to express the feeling that each class of mail pay those direct or indirect cost attributable to it.
>
> We agreed that the principle of the House bill be included in the final version of the legislation. *This would establish a "floor" for each class of mail equal to costs called "demonstrably related costs" in the House version and "attributable costs" in the final version. Such costs consists of those costs, both direct and indirect, which vary over the short term in response to changes in volume of a particular class of which, even though fixed rather than variable, are the consequence of providing the specific class or service involved.* The committee felt that such costs were capable of objective determination and proof either by empirical observation or deductive analysis.

116 Cong. Rec. 27,606 (1970); Leg. Hist. at 365 (emphasis added). Representative Udall's substitution of the word "attributable" for "demonstrably related" indicates the interchangeability of the two.[16]

---

[16] The controversy in Petitioners' and Intervenor's briefs over the weight to be given to the "Statement of the Managers on the Part of the House" in the Conference Report and Congressman Udall's floor statement, from which the above quotations are taken, only highlights the significance of those statements. Petitioners argue that the statements are entitled either to no weight (NAGCP Brief at 26-27, UPS Brief at 35 n.17) or that such statements are "unreliable" and "not determinative." UPS Brief at 34. Intervenor

Representative Udall also explained Section 3622(b)(3)'s "reasonably assignable" requirement as follows:

> In addition to this threshold requirement, the legislation provides for a judgmental assignment of some part of the remaining costs. The judgment as to what portion of institutional costs should be borne by each class is to be made in the light of the criteria in the bill.
>
> I have dwelt at length on this section because I believe it goes to the heart of what we are trying to do by giving management some responsibility and prerogatives.

116 Cong. Rec. 27,606 (1970); Leg. Hist. at 365. Contrary to the interpretation of Section 3622(b)(3) in *NAGCP I* (569 F.2d at 587), Representative Udall's explanation of Section 3622(b)(3) contemplated a two-step process of "attribution" and "assignment". As Intervenor DMMA states, "one searches in vain throughout the legislative history for mention of a three-step ratemaking process; the discussions are consistently framed

---

DMMA argues that such statements are entitled to "lesser weight" than the Senate Report. DMMA Brief at 36. But regardless of the comparative weight to be accorded to the statements, they are still important indicators of Congressional intent. However, since the House minimum rate floor, sponsored by Representative Udall, prevailed, the statements should be accorded substantial weight. North Haven Board of Education v. Bell, 102 S.Ct. 1912, 1920-21 (1982); Brotherhood of Maintenance of Way Employees v. United States, 366 U.S. 169, 174-76 (1961). In any event, one would have to assume that the House Managers conspired to defeat some (unstated) compromise in Conference to ignore the statements. Such an assumption should not be made without any evidence to support it. Since the statements are the only legislative history of what the Conferees intended by the ratemaking section of the statute, the Court should, of course, rely on them. *See, e.g., North Haven Board of Education, supra.* As Chief Justice Marshall stated: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

in two, and not three, parts." DMMA Brief at 11 (footnote omitted).

Finally, the Court of Appeals in *NAGCP I* claimed that the legislative history of the Act with respect to lobbyist influence supported its interpretation of Section 3622(b)(3). *See* 569 F.2d at 587-90. This is simply incorrect. Congress intended to deal with the problem of lobbyist influence by removing itself from the process (39 U.S.C. §§ 2401(c) and 3626), by establishing an independent rate commission (39 U.S.C. § 3601) by requiring public hearings on the record (39 U.S.C. § 3524), by the elimination of a Congressional veto (contained in H.R. 17070) and by urging that the President impose a stringent code of ethics on the PRC and its staff (116 Cong. Rec. 27,605 (1970); Leg. Hist. at 364; *see* 39 C.F.R. Part 3000, required by Executive Order 11570, 35 Fed. Reg. 18,183 (1970)). Representative Udall summed up the attitude of the Conferees on this issue:

> From the very beginning, there was widespread agreement between House and Senate conferees that Congress should lay down broad policy guidelines and that we leave the application of those policies to full-time, professional rate commissioners. It was emphasized that Congress must be taken out of the ratemaking procedure once and for all. The reason for this is clear: Fixing postal rates under intense lobbying pressures, as done in the past, produces neither fair and adequate rates, nor does much to strengthen the role of Congress.

116 Cong. Rec. 27,605 (1970); Leg. Hist. at 364. The Senate Report indicates that "Congress should be removed entirely from the ratemaking and classification business" because "rates and classifications are to be established on the basis of expert consideration of the overall value of the service provided and the allocation of costs on a scientific or quasi-scientific basis." S. Rep. No. 912 at 11; Leg. Hist. at 304. Thus, Congress wanted

to get "politics out of the postal service" (116 Cong. Rec. 26,954 (1970); Leg. Hist. at 358) by expert ratemaking, not by requiring any specific cost allocation methodology. *See* 116 Cong. Rec. 26,955 (1970); Leg. Hist. at 359.

The legislative history is clear and leads to only one conclusion: that Congress intended a two-step ratemaking process considering all of the factors in Section 3622(b), with a minimum rate floor as contemplated by the House in its version of the bill.

3. *Subsequent Legislative Developments.*

After the D.C. Circuit's decision in *Association of American Publishers*, Congress became concerned that the PRC had given insufficient consideration to the non-cost criteria in Section 3622(b). Accordingly, Congress added a new criterion: "the educational, cultural, scientific, and informational value to the recipient of mail matter." [17] In 1975, Representative Schroeder offered an amendment to require allocation of costs utilizing the type of cost-of-service principles the *NAGCP I* court subsequently read into the Act. That amendment was defeated.[18]

These subsequent developments confirm that Congress intended that no particular ratemaking methodology is

---

[17] 39 U.S.C. § 3622(b)(8), *as amended*, Pub. L. No. 94-421, § 10, 90 Stat. 1311; *see* 122 Cong. Rec. 29,747-48 (1976); Leg. Hist. at 375-76. The adoption of such an amendment is, obviously, a matter of considerable importance in construing the statute. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[18] *See* 121 Cong. Rec. 30,777, 30,777-84 (1975); Leg. Hist. at 367-374. "Although postenactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX. . . .'" North Haven Board of Education v. Bell, 102 S.Ct. at 1925, *quoting* Cannon v. University of Chicago, 441 U.S. 677, 687 n.7 (1979).

prescribed by Section 3622(b) and that the D.C. Circuit erred by holding to the contrary in *NAGCP I* and *NAGCP III*.

II. AFFIRMANCE OF THE JUDGMENT OF SECOND CIRCUIT IS IN THE PUBLIC INTEREST.

In 1976, Congress created a Commission on Postal Service ("CPS"). Pub. L. No. 94-421, § 7, 90 Stat. 1311 (1976). The Commission transmitted a Report to the President and Congress in 1977. The Commission's Report vividly demonstrates that the public interest lies in affirmance of the Second Circuit. The Commission concluded that Section 3622(b) contemplates a two-step costing methodology (Leg. Hist. at 383), and that the impact of affirming the D.C. Circuit would be to "erode total mail volume." Leg. Hist. at 386. The Report goes on to state:

> But unless mail volume increases, the unit cost of providing new service will necessarily increase. The inevitable result will be rate increases to pay cost increases, volume loss caused by increased rates, and further rate increases to make up for lost revenue caused by volume loss.

Id. The Commission noted that

> The least expensive mail from the Postal Service's standpoint is mail which is finely sorted and sacked in sufficient quantity to minimize postal handling. Unfortunately, this is the mail most likely to be diverted to alternative means of delivery. Newspapers, mass circulation magazines, and third class mail which have deliveries concentrated in certain areas, can purchase competitive alternative delivery service. But mailers who do not have that delivery concentration must continue to use the postal system. A small literary journal with 100,000 subscribers spread across the Nation has no alternative. For the Postal Service, which may have to handle such a journal four or five times while it is in the mail

> stream, the cost will exceed the rate charged, particularly as total mail volume declines and unit costs rise.

Id. The Commission recommended that

> Congress enact into law a method of allocating costs that will help preserve second, third, and fourth class mail volume for the Postal Service. The decision of the United States Court of Appeals for the District of Columbia Circuit, rejecting the assignment of a substantial portion of postal costs on the basis of non-cost criteria, is not in the best interest of the Postal Service and the Nation it serves because of its severe future impact on volume, revenues, and costs. Allocating costs without regard to non-cost criteria may appear to benefit first class mail users. In the long run, however, that method of allocating costs will drive away second, third, and fourth class volume and revenue, and in turn require even greater increases in first class rates.

Id. *The Wall Street Journal* is a prime example of the adverse effect of postal ratemaking under *NAGCP I* and *NAGCP III*. Frederick G. Harris, Vice President/Finance of Dow Jones, testified that:

> I have outlined the impact that postal increases have had upon Dow Jones. They have been a contributing factor to the decision to cease publication of *The National Observer*. They have caused the Company to develop a private delivery system. They have been a major factor in causing the profit margin of the largest newspaper in the United States to decline. If the postal increases of the past have had such a dramatic impact on a company as fortunate as we are, imagine the impact they have had on small publications.

J.A. at 132a; *see also* J.A. at 135a-138a (testimony of Dow Jones Witness King noting efficiencies of mail delivery of *The Wall Street Journal* and dramatic increase in private deliveries of *The Wall Street Journal* between 1971

and 1980). The Chairman of the PRC made the same point in Congressional testimony on the Commission's Report. He stated:

> I believe that the decision of the Court of Appeals [in *NAGCP I*] is wrong. If it reaches the Supreme Court, I believe the Justices can be shown that the Court of Appeals decision should be reversed. . . . I fully support the CPS proposal to revise section 3622(b)(1) to make it clear that noncost factors have a legitimate and highly important place in postal rate determinations. The reasoning used by the CPS—that the great increases in second-, third-, and fourth-class rates which the court's theory would require, would drive those items out of the postal system altogether and thus cause increases in first-class rates—in my view is perfectly sound.

Evaluation of the Report of the Commission On Postal Service: Hearings Before the Subcommittee on Energy, Nuclear Proliferation and Federal Services, 95th Cong., 1st Sess. 81-28 (1977); Leg. Hist. at 391-392. Three of the four Commissioners of the PRC testified, in House Hearings on H.R. 7700, that the holding of *NAGCP I* was erroneous. *The Postal Service Act of 1977: Joint Hearings Before the Subcommittee on Postal Operations and Services and the Subcommittee on Postal Personnel and Modernization*, 95th Cong., 1st Sess. 232 (1977); Leg. Hist. at 410. The Postal Service agreed with this legislative approach. *Postal Service Amendments of 1978: Hearings Before the Senate Subcommittee on Energy Nuclear Proliferation, and Federal Services on S.3229 and H.R. 7700*, 95th Cong., 2d Sess. 608, 617-18 (1978); Leg. Hist. at 430, 439-440. Although H.R. 7700 was not voted upon (because its appropriations provisions were reached too late in the Session to comply with the Budget Act, S. Rep. No. 1244, 95th Cong., 2d Sess. 1-3 (1978); Leg. Hist. at 462-464), the consistency of these views is strong evidence that the Postal Service and the Nation would benefit if the Second Circuit is affirmed.

III. THE SERVICE-RELATED COST ALLOCATION FORMULA IS THE PRODUCT OF THE D.C. CIRCUIT'S HOLDINGS; THE VALIDITY OF THAT METHODOLOGY SHOULD NOT BE ADDRESSED BY THE COURT AT THIS TIME.

In the decision of the Board under review, the Board rejected the notion of assigning unattributable postal costs to certain categories of mail on the ground that these are "service-related." *See* App. B at 12b-14b. The assignment of service-related costs was a direct result of the decision of the Court of Appeals in *NAGCP I* and *NAGCP III*. *Id.* at 13b. The Board noted that the concept of "service-related costs" was used for the first time in the immediately preceding rate case, Docket No. R77-1, in an attempt to conform to *NAGCP III*.

Petitioner NAGCP attacks the PRC's use of service-related costs as the basis for setting postal rates, NAGCP Brief at 32-37, but Intervenor DMMA supports the concept of service-related costs. DMMA Brief at 36-40. The Court should not enter the thicket of service-related costs to pass judgment on the validity of that costing methodology. Rather, after determining that the D.C. Circuit's interpretation of Section 3622(b) is wrong, the Court should make clear that the PRC is free to abandon the concept of service-related costs in the next rate proceeding. 663 F.2d at 1201-03. It is unnecessary for the Court at this juncture to review the validity of a concept that the postal agencies are free to abandon. Embroiling the Court at this time in the merits of highly technical accounting methods is inappropriate, assuming that the Court interprets Section 3622(b) to permit or require postal ratemaking on the basis of all of the criteria in Section 3622(b), with none predominant.

CONCLUSION

Congress intended that all of the factors in Section 3622(b) of the Postal Reorganization Act be emphasized in setting postal rates, with none predominant. Under

Section 3622(b), Congress intended that the PRC use a two-tier costing methodology in postal ratemaking, and did not require that cost-of-service principles be maximized. The Court should not attempt to determine the precise method of cost allocation that should be used in setting postal rates, but should permit the postal agencies to do so after the proper interpretation of the statute is decided. The judgment of the Second Circuit should be affirmed.

Respectfully submitted,

RAYMOND N. SHIBLEY
MICHAEL F. MCBRIDE
LEBOEUF, LAMB, LEIBY & MACRAE
Suite 1100
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 457-7500

W. GILBERT FAULK, JR.
DOW JONES & COMPANY, INC.
Post Office Box 300
Princeton, New Jersey 08540

Counsel for
Dow Jones & Company, Inc.

September, 1982

Respondent's Brief

4

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT MAGAZINE PUBLISHERS ASSOCIATION, INC.

DAVID MINTON
Counsel of Record
Loomis, Owen, Fellman & Howe
2020 K Street, N.W.
Washington, D.C. 20006
(202) 296-5680

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

QUESTION PRESENTED

Whether the D.C. Circuit properly construed the language of section 3622 (b)(3) of title 39, United States Code, by requiring a maximum use of "cost-of-service principles" in allocating postal costs for the purpose of setting postal rates, or whether the Second Circuit properly construed the law by permitting the postal agencies to exercise broad discretion in attributing and assigning costs on the bases of volume variability and market factors.

NOTE

In accordance with Rule 34.2, Respondent dispenses with the inclusion of the listing of parties, opinions and judgments delivered in courts below, statement of jurisdiction, and citation of the legal grounds upon which the case is based, all of which are set out in the briefs of Petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONGRESS SPECIFICALLY REJECTED PROPOSALS WHICH WOULD HAVE IMPOSED "COST-OF-SERVICE PRINCIPLES" IN THE ALLOCATION OF POSTAL COSTS AND DETERMINATION OF POSTAL RATES 4

A. THE HOUSE'S REJECTION OF UNITED PARCEL SERVICE'S AMENDMENT 6

B. THE SENATE'S REJECTION OF UNITED PARCEL SERVICE'S AMENDMENT 9

C. CONGRESS ALSO REPEALED EXISTING PROTECTION FOR PRIVATE EXPRESS COMPANIES 10

D. THE SENATE COMMITTEE REJECTED OTHER COSTING LANGUAGE SUGGESTING THE USE OF "COST-OF-SERVICE PRINCIPLES" 11

II. THE D.C. CIRCUIT'S MISTAKEN INTERPRETATION AROSE OUT OF THE COURT'S BELIEF THAT CONGRESS'S "CENTRAL AND EXPRESS AIM" WAS TO GET "POLITICS OUT OF THE POST OFFICE" AND TO IMPOSE "SEVERE LIMITATIONS" ON AGENCY DISCRETION IN SETTING POSTAL RATES 13

A. GETTING "POLITICS OUT OF THE POST OFFICE 13

Page

B. CONGRESS DID NOT INTEND TO IMPOSE "SEVERE LIMITATIONS" ON AGENCY DISCRETION; CONGRESS DELEGATED BROAD POWERS IN ALL ASPECTS OF POSTAL OPERATIONS 14

C. THE D.C. CIRCUIT MISINTERPRETED THE SENATE REPORT AND DISTORTED THE LANGUAGE OF THE CONFERENCE REPORT 18

III. THE CORRECT INTERPRETATION OF THE SENATE BILL AND THE RESOLUTION OF THE ISSUES IN CONFERENCE 21

A. THE COURT MISINTERPRETED THE COSTING LANGUAGE OF THE SENATE BILL 21

B. THE STANDARDS OF THE HOUSE BILL, NOT THE SENATE BILL, WERE "MORE STRINGENT". 23

C. THE HOUSE, NOT THE SENATE, PREVAILED IN CONFERENCE ON THE TWO IMPORTANT RATEMAKING ISSUES 24

D. THE SENATE CONSIDERED "INCREMENTAL COST" TO BE THE APPROPRIATE MINIMUM LEVEL OF COST RECOVERY 26

E. THE LANGUAGE IN SECTION 3622(b)(3) WAS DERIVED FROM THE HOUSE BILL AND THE DEFINITION OF "DEMONSTRABLY RELATED COSTS" IN THE DEPARTMENT'S REVENUE AND COST ANALYSIS 28

CONCLUSION 31

TABLE OF AUTHORITIES

Cases: **Page**

National Association of Greeting Card Publishers v. United States Postal Service 569 F.2d 570 (D.C. Cir., 1976), vacated as to the issues, 434 U.S. 884 (1977) ..... 4, *passim*

Newsweek et. al. v. United States Parcel Service, 665 F.2d 1186 (2d Cir., 1981), certiorari granted, 72 L.Ed. 2d 439 (1982) 32

U.S. v. Fisher, 2 Cranch 358 (1805) 31

Statute:

Title 39, United States Code, as enacted by Section 2 of the Postal Reorganization Act, 84 STAT. 719:

39 U.S.C. 403 16
39 U.S.C. 404 16
39 U.S.C. 410 16
39 U.S.C. 1001 16
39 U.S.C. 3623 16
39 U.S.C. 3626 25
39 U.S.C. 3622(b)(3) 2, 4, 28, 29

Legislative Materials:

Bills:

H.R. 11750 6
H.R. 17070 ..... 7, 8
S. 3613 ..... 6, 11, 12
S. 3842 ..... 11, 12, 21, 22, 23, 26

Reports:

Report to accompany H.R. 17070, Committee on Post Office and Civil Service, U.S. House of Representatives, 91st Congress, Report No. 91-1104 14

Page

Conference Report to accompany H.R. 17070, U.S. House of Representatives, 91st Congress, Report No. 91-1363 ..... 21, 24, 30, 31

Report to accompany S. 3842, Committee on Post Office and Civil Service, U.S. Senate, 91st Congress, Report No. 91-912 ..... 10, *passim*

Debates:

Congressional Record, Volume 116, parts 15, 16 ..... 8, 11, 17, 18, 22, 30

Hearings:

Post Office Reorganization: Committee on Post Office and Civil Service, U.S. House of Representatives, 91st Congress (1969) 7

Postal Modernization: Committee on Post Office and Civil Service, United States Senate, 91st Congress (1970) 6, 9, 20, 24, 26, 27

Postal Rates and Revenue and Cost Analysis: Committee on Post Office and Civil Service, U.S. House of Representatives, 91st Congress (1970) ... 28, 29

House Documents:

Message from the President of the United States April 6, 1970, House Document 91-298, 91st Congress 19

Message from the President of the United States, April 16, 1970, House Document 91-313, 91st Congress 19

Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States, 97th Congress, House Document 96-398 (1981) 30

Page

Miscellaneous:

Revenue and Cost Analysis, Fiscal Year 1969, U.S. Post Office Department, April, 1970 ..... 25, 29

Opinion and Recomended Decision of the U.S. Postal Rate Commission, Docket No. R80-1 29

Towards Postal Excellence, Report of the President's Commission on Postal Organization, June, 1968 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1304 and 81-1381

NATIONAL ASSOCIATION OF
GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT MAGAZINE PUBLISHERS ASSOCIATION, INC.

STATEMENT OF THE CASE

In accordance with rule 34.2, Respondent adopts and fully agrees with the Statement of the Case as presented in the Respondents' Brief of Newsweek, Inc., and Time, Incorporated.

SUMMARY OF ARGUMENT

Section 3622(b)(3) of title 39, United States Code, was intended to divide postal costs into two categories: attributable costs, which would be measured on the basis of volume variability, and "all other costs" which would be reasonably assigned among the various classes of mail on the basis of the noncost factors enumerated in the law.

The United States Court of Appeals for the District of Columbia Circuit wrongly construed these ratemaking provisions enacted in the Postal Reorganization Act in deciding Congress intended that costs must be attributed and assigned with a maximum use of "cost-of-service principles." Congress rejected proposals which would have imposed "cost-of-service principles" upon the new postal agencies. The House of Representatives rejected United Parcel Service's proposed amendment applying "cost-of-service" principles to parcel post, and the Senate Committee on Post Office and Civil Service rejected United Parcel's proposal, describing it as simply "protecting a particular economic interest." The Senate Committee, which the Court of Appeals believed was the advocate of the use of "cost-of-service principles," actually rejected the enactment of any statutory costing methodology and specifically stated that under the Senate bill no class of mail would be required "to recover a designated portion of its cost beyond its incremental cost."

The D.C. Circuit ignored all relevant evidence of congressional intent, relying instead upon Congress's pledges to end political patronage to support its view that Congress intended to eliminate virtually all agency discretion in setting postal rates. In fact, Congress delegated extremely broad authority to the Postal Service in all aspects of its operations. The Senate bill delegated even broader authority to the postal agencies to determine which, if any mailers would have preferential rate status, which methodology would be used in allocating postal costs, and what the minimum level of cost recovery would be. The D.C. Circuit completely misunderstood the legislative history of

the Senate bill in constructing its interpretation of the meaning of the costing language in the Senate bill and in the law.

The two important postal ratemaking issues resolved in the House-Senate conference on the postal reorganization bill were (1) whether the statute would prescribe a statutory minimum level of cost recovery rather than permitting the postal agencies to make that decision, and (2) whether Congress would preserve by statute the preferential status historically accorded small town newspapers, libraries, nonprofit organizations, and other select mailers. On both issues, the House of Representatives (and the Nixon Administration) prevailed. The Senate yielded on both of the basic principles which had distinguished the Senate bill from the Administration proposal. The Senate agreed that the statute, not the postal agencies, would prescribe both the minimum level of cost recovery and the preference for nonprofit organizations and other preferred mailers. The philosophical difference between the Senate and the House on what the minimum level of cost recovery should be was the narrow distinction between the Senate's "incremental costs" approach and the slightly higher House requirement of "direct *and indirect*" costs which vary with volume. Having resolved the important policy question that the statute, not the postal agencies, would prescribe the minimum level of cost recovery, the conferees adopted the House language with slight changes in terminology.

The D.C. Circuit's decision in *NAGPC I* would inevitably restrict agency discretion to the disadvantage of the postal system and the American people who are its customers. Congress intended the opposite result: To permit broad discretion in postal ratemaking and other areas of postal operations.

ARGUMENT

The purpose of this brief is to demonstrate that Congress specifically rejected the type of costing methodology which the United States Court of Appeals for the District of Columbia Circuit said is required under the ratemaking provisions of the Postal Reorganization Act; to show how the court misinterpreted the language and distorted the legislative history of the Senate bill, which the court mistakenly considered to be the basis of the costing language in the Act; and to present an accurate view of Congress's intent in enacting section 3622(b)(3) of title 39, United States Code.

I.

CONGRESS SPECIFICALLY REJECTED PROPOSALS WHICH WOULD HAVE IMPOSED "COST-OF-SERVICE PRINCIPLES" IN THE ALLOCATION OF POSTAL COSTS AND DETERMINATION OF POSTAL RATES.

In *National Association of Greeting Card Publishers v. United States Postal Service,*[1] the United States Court of Appeals for the District of Columbia Circuit interpreted the ratemaking provisions of the Postal Reorganization Act to mean:

> first and foremost the Act requires that special efforts be made to maximize the use of cost-of-service principles in the allocation of postal costs.[2]

The court's interpretation of the costing language is remarkable because while the ratemaking provisions are not

---

[1]569 F.2d 570 (D.C. Circuit, 1973), vacated as to other issues, 434 U.S. 884 (1977). Herein after cited as *NAGCP I.*

[2]569 F.2d 587. The court's opinion is filled with language indicating that the "plain meaning," "plain reading," and "clear" intent of the Act is to require the use of "cost of service principles" "as far as reasonably possible," "to the fullest extent possible," and "to the fullest extent reasonably possible." 569 F.2d 584, 585, 590.

self-explanatory, nothing about the legislative history of the Act is more certain than that Congress specifically rejected the "cost of service principles" costing methodology which the court said the Act requires.

In the administrative proceeding which led to *NAGCP I*, the Chief Administrative Law Judge for the Postal Rate Commission distributed the costs of the Postal Service on what he called a "cost-of-service" basis. For instance, using cubic dimension and weight as his method, the Judge "attributed" 98 percent of the Service's transportation costs and "reasonably assigned" the remaining 2 percent in direct proportion to attribution. His recommendations were rejected by the Postal Rate Commission, but the D.C. Circuit in *NAGCP I* upheld the Judge's approach and looked with favor upon his methodology.[3]

Called by whatever name, "cost-of-service principles" lead inevitably to a maximum distribution of costs without regard to the use of discretion and market pricing factors. It was that kind of meaningless cost allocation system which the Post Office Department used in its annual Cost Ascertainment Report for more than 40 years, and its discontinuance was one of the principal aims sought in the postal reform movement.[4]

The House of Representatives and the Senate, jointly and severally, specifically rejected "cost-of-service principles" as a costing system to be used by the Postal Service and the Postal Rate Commission in setting postal rates. Both Houses rejected United Parcel Service's pleas for the enactment of a statutory requirement that parcel post recover costs far exceeding the costs required to be recovered by other classes of mail; both Houses also repealed the then-existing law which for twenty years had required parcel post to recover its fully allocated costs, and the Senate rejected other language suggesting the use of "cost-of-service principles."

---

[3]569 F.2d 583-585

[4]Towards Post Excellence, The Report of the President's Commission on Postal Organization, June 1968, pages 31, 132-133. The hearings on postal reorganization before the House of Representatives and the Senate also reflect the Congress's and mail users' interest in abandoning the Department's method of cost allocation.

A. The House's Rejection of United Parcel Service's Amendment.

When the postal reorganization bill was proposed to Congress in 1969, the law already provided statutory protection for United Parcel, REA Express, and other "enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters."[5] That law, first enacted as a rider to the Supplemental Appropriations Act in 1950, required that parcel post revenues be sufficient to pay its cost, based on fully allocated cost figures from the Cost Ascertainment Report of the Post Office Department.[6]

The Nixon Administration's postal reorganization proposal, introduced as H.R. 11750 by Representative Morris K. Udall on May 28, 1969, continued some statutory protection for private carriers. Section 1203 of that bill provided:

> The Postal Service, in setting rates for services involving parcels, shall recover the carrying charges on all capital employed in providing such service and shall recover an imputed charge for Federal, State and local taxes which it would have to pay if it were privately owned, and providing such service.[7]

---

[5]The provision protecting private carriers was 39 U.S.C. 4559, (1970 ed.) The "enterprises" phrase originated in S.3613, the first Senate postal reorganization bill introduced by the chairman of the Committee on Post Office and Civil Service, Senator Gale W. McGee, and enacted into law in 39 U.S.C. 3622(b)(4). Joint Appendix of Relevant Legislative Materials, 241. Hereinafter cited as *Legislative Appendix.*

[6]64 STAT. 1050; amended to permit a four percent variation (either way) by 72 STAT. 143 (the Postal Policy Act of 1958); suspended during the period July 1, 1963 until July 1, 1966 by 77 STAT. 71; repealed by 80 STAT 819. Section 1(a) of Public Law 89-593 (80 STAT. 815) revised and reenacted the provision effective July 1, 1966, as section 4559 of title 39, United States Code (prior to the Postal Reorganization Act).

[7]H.R. 11750 is found in Hearings, Postal Modernization, Committee on Post Office and Civil Service, U.S. Senate, 91st Congress. Section 1203 is at page 74. Hereinafter cited as *Senate Hearings.*

United Parcel testified in support of its own proposal before the Committee on Post Office and Civil Service in the House of Representatives on July 9, 1969. United Parcel's proposal would have required parcel post to recover capital carrying charges, imputed taxes, demonstrably related costs, and "a reasonable part" of institutional costs, with rate adjustments made "at least annually."[8]

Subsequently, after the Administration submitted its second bill, H.R. 17070, the House Committee adopted an amendment, section 1201(f), generally reflecting United Parcel's recommendation:

> Notwithstanding any other provision of this title, fourth-class parcel post service shall bear, in addition to those costs demonstrably related to such service under subsection (c) of this section, such portion of all other costs incurred by the Postal Service (including, without limitation, costs described in the second sentence of subsection (b) of this section) as will assure that the revenue of such service will not be less than the costs thereof, determined under this subsection, by more than 4 per centum and will not be greater than the costs thereof by more than 4 per centum.[9]

In the House debate on the bill June 18, 1970, Representative Albert Johnson, a member of the Committee who opposed the United Parcel amendment, proposed a floor amendment to strike section 1201(f). He said:

> We are now establishing a new Postal Service to establish a new organization to run the Post Office into the next century. I do not feel that the rate board should have their hands tied with respect to any class of mail . . . . But here is a provision singling out

[8]Hearings, Post Office Reorganization, Committee on Post Office and Civil Service, U.S. House of Representatives, 91st Congress, pages 547-571.

[9]H.R. 17070, § 1201(f) as reported, *Legislative Appendix*, 342.

> fourth-class mail for special treatment. Why is that special treatment in this bill? Because the long arm of vested interests reached into the committee, and because of strong influences they were able to get the amendment adopted. Now this provision singling out fourth-class mail is totally inconsistent with the rest of the bill. It will unfairly burden the parcel post for ratemaking purposes and will tend to price it out of the market, contrary to the public interest. The full allocation of all costs, as prescribed now under this bill, to fourth-class mail will mean the rate broad will have to overlook the value of the service, the elasticity of demand, the quality of service and would eliminate all the discretion entirely of the ratemakers.[10]

Representative Udall, the floor manager of the bill, agreed:

> Mr. Chairman, I commend the gentleman on the fine statement he has made. I support the amendment offered by the gentleman from Pennsylvania. What the amendment proposes to do is to treat the fourth class exactly the same as the other classes of mail, and to make sure it pays its way, as we will have the other classes do, and we do not single out in the amendment just one class of mail for special treatment. We are voting for a universal parcel post service for the people we represent if we support the amendment.[11]

Representative Edward Derwinski, a member of the Committee and a cosponsor of H.R. 17070, also criticized the provision:

> There is no need to single out fourth-class mail for special restrictions from which first-, second-, and third class mail in this bill are excluded.

By a voice vote, the House struck the United Parcel amendment from the bill. No request was made for a roll call vote.[12]

---

[10]116 *Congressional Record 20455*

[11]116*Congressional Record* 20456.

[12]116 *Congressional Record* 20458.

B. The Senate's Rejection of United Parcel Service's Amendment

In the meanwhile, on November 13, 1969, United Parcel's president testified in support of its amendment before the Senate Committee on Post Office and Civil Service. In response, Senator Gale McGee, the Committee chairman, said:

> I think the margin that separates us here is what would be construed as being unfair to you on the one hand, and what would be construed as fair to the individual citizen or taxpayer on the other, and there has to be a margin here of some sort. That is where we would try to arrive at the happiest possible compromise.[13]

The "happiest possible compromise" arrived at by the Senate Committee was expressed in its report to the Senate:

> Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost. That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law. That criteria for ratemaking include seven specific requirements, among them, the effect of rate increases upon "enterprises in the private sector of the economy engaged in the delivery of mail other than letters." To go beyond that point would simply be to recommend provisions of law protecting a particular economic interest or

---

[13] *Senate Hearings,* page 703. United Parcel's testimony is found at pages 685-710 of the *Senate Hearings,* and the language of the United Parcel amendment is printed at page 692.

> limiting the availability of a Federal parcel delivery service.[14]

No effort was made during the Senate's debate on the bill to reintroduce the United Parcel amendment. As neither House had passed legislation relating to the United Parcel proposal, the issue was not subject to conference.

C. Congress Also Repealed Existing Protection for Private Express Companies

The Senate Committee not only singled out United Parcel Service's amendment for specific rejection, but reported to the Senate that the fully-allocated parcel post cost recovery provisions of then-existing law were being repealed by the new legislation. Section 2 of the Postal Reorganization Act was an amendment to title 39, United States Code, which "revised and reenacted" the entire title, repealing all previous law. The Senate Committee called attention to the effect of this comprehensive repeal:

> Although parcel post as a specific class of mail, and the cost recovery characteristics of parcel post established by Public Law 81-199 and revised in Public Law 89-593, are not included in the bill recommended by the committee, we do nevertheless expect that the historic principle of delivering packages through the Postal Service will be fulfilled.[15]

Twenty years of a legislative policy to protect private interests came to an end.

---

[14]Report to accompany S.3842, Committee on Post Office and Civil Service, U.S. Senate, 91st Congress, Senate Report No. 91-912, page 17, *Legislative Appendix*, 310. Hereinafter cited as *Senate Report*.

[15]84 STAT. 719; *Senate Report*, page 17; *Legislative Appendix*, 310. "Parcel post as a specific class of mail" was "not included" in the Senate bill because *all* existing classes of mail were abolished. The Postal Service was instructed to request the Postal Rate Commission to submit recommendations for a new mail classification schedule, 39 U.S.C. 3623(b). This comprehensive proposal illustrates the breadth of the Senate's delegation of authority to the postal agencies.

D. The Senate Committee Rejected Other Costing Language Suggesting the Use of "Cost-of-Service Principles."

United Parcel's amendment related only to the cost recovery required of zone-rated fourth-class parcel mail. The Senate Committee also considered costing language which, at least from its appearance, suggested "cost-of-service principles."

The costing language originally included in Senator McGee's first postal reorganization bill, S.3613, provided:

> the amount of operating cost, overhead, and other institutional costs of the Department properly attributable to each class of mail in proportion to its share of mail volume.[16]

The language was revised several times before it was incorporated into S.3842.[17] In that bill, as introduced, the paragraph read:

> the amount of operating costs, overhead, and other institutional costs of the Postal Service properly attributable to each class of mail or type of mail service based on and in proportion to its share of mail volume and its overall effect upon the postal system.[18]

Senator McGee never described the intent of this provision. All of the versions of S.3613 and S.3842 – there were 17 – contained noncost statutory factors in addition to the costing language, and there was no statutory requirement that any class of mail recover a "designated portion" of its costs.[19] From its

---

[16]S.3613, § 3702(c)(2), *Legislative Appendix*, 241.

[17]*Legislative Appendix*, 244-245, 251.

[18]S.3842, § 3703(c)(3), *Legislative Appendix*, 256.

[19]116 *Congressional Record* 22052; *Senate Report*, page 17, *Legislative Appendix*, 310.

appearance, however, the language certainly suggests some form of fully-allocated methodology. Whatever the authors may have intended, nothing sounds incremental about "based on and in proportion to its share of mail volume and its overall effect upon the postal system." Nevertheless, the Committee enumerated the noncost criteria in this version of the bill, just as they had been spelled out in all others.[20]

When S.3842 was reported on June 3, 1970, the costing language had been substantially amended. The phrase "based on and in proportion to its share of mail volume and overall effect upon the postal system" had been stricken entirely from the bill so that the paragraph read:

> operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service.[21]

United Parcel Service has argued here and in courts below:

> Clearly, when a bill is revised . . . , the views of those whose language was not accepted cannot control the interpretation of the version adopted . . . [A] change in the language of a bill in favor of quite different language constitutes a rejection of the changed language.[22]

---

[20]The noncost list was introduced in S.3613, changed slightly twice thereafter in Committee, and enacted into law. *Legislative Appendix*, 240-241. 244-245. 251-252.

[21]S.3842, § 3704(g)(3), as reported. *Legislative Appendix*, 263.

[22]Brief of United Parcel Service, pages 35-36. Petitioner NAGCP describes the change in the bill as reported as "somewhat altered" but quotes Senator McGee's floor statement to the effect that "no significant changes were intended" from the bill as introduced. Senator McGee may have been exercising his senatorial prerogative to gloss over numerous revisions. Another "insignificant" change, for instance, was the provision giving the Governors of the Postal Service the power to modify the Postal Rate Commission's recommended decisions, a power specifically denied in the bill as introduced. Compare § 3703(d)(1) of S.3842 as introduced to § 3704(h)(1) of S.3842 as reported, *Legislative Appendix*, pages 257, 264.

Applying this "well established canon of statutory construction"[23] to the intent of the Congress in enacting section 3622(b)(3) means this:

Both Houses of Congress specifically rejected the proposal submitted by United Parcel Service that would have imposed a "cost-of-service" cost recovery requirement on parcel post.

The law existing in 1970, requiring that parcel post recover its "fully allocated" cost was specifically repealed by the Postal Reorganization Act.

The Senate Committee also considered other language involving "cost of service principles." The Senate Committee rejected that language.

The "very words,"[24] as the D.C. Circuit put it, giving substance to the court's interpretation and Petitioners' arguments today, were specifically rejected by both Houses of Congress.

II.

THE D.C. CIRCUIT'S MISTAKEN INTERPRETATION AROSE OUT OF THE COURT'S BELIEF THAT CONGRESS'S "CENTRAL AND EXPRESS AIM" WAS TO GET "POLITICS OUT OF THE POST OFFICE" AND TO IMPOSE "SEVERE LIMITATIONS" ON AGENCY DISCRETION IN SETTING POSTAL RATES.

A. Getting "Politics Out of the Post Office".

The court's preoccupation with Congress's alleged desire to get "politics out of the Post Office" blinded the court to the broad delegations of power to the new postal agencies in the Postal Reorganization Act. The court's failure to perceive Congress's intent is illustrated by its reliance upon two statements in

[23]Brief of United Parcel Service, page 36.

[24]569 F.2d 585.

the committee reports in support of its contention that Congress intended to eliminate "politics" in postal ratemaking by "severely curtailing" agency discretion. The court quoted part of the House report, saying: "it was a central and express aim . . . to get 'politics out of the Post Office'." The complete paragraph in the House Report stated:

> If the American public is to have the postal service that it expects and deserves, the Post Office must be taken out of politics and politics out of the Post Office. Nineteenth century customs of political patronage have no place in a late 20th century postal system.[25]

The Senate Report's statement, half a page longer, was to the same effect.[26] Neither statement said anything about limiting agency discretion, postal rates, or costing methodology. The statements related exclusively to political patronage in the appointment of postmasters, rural carriers, and other employees.

B. Congress Did Not Intend to Impose "Severe Limitations" on Agency Discretion; Congress Delegated Broad Powers in All Aspects of Postal Operation.

The D.C. Circuit's interpretation of the ratemaking provisions of the Postal Reorganization Act was derived principally from

---

[25]Cited by the court at 569 F.2d 588, footnote 62. The quotation is found in Report to accompany H.R. 17070, Committee on Post Office and Civil Service, U.S. House of Representatives, 91st Congress, House Report No. 91-1104, page 6; *Legislative Appendix*, 270, hereinafter cited as *House Report*. Incantations aside, the House's fervor to curtail politics in the Post Office did not extend to surrendering control over rates for small-town newspapers and non-profit organizations, or to eliminating the one-House veto over postal rate increases. Nor did the conferees neglect to ensure the protecton of acting postmasters appointed in the last days of the Johnson Administration. The conferees gave civil service eligibility to any acting postmaster serving on January 1, 1969. 84 STAT. 786.

[26]*Senate Report*, page 8; *Legislative Appendix*, 301.

their reading of the Senate bill, S.3842, summarized in the following statement:

> Debate over the Act discloses that Congress was well aware of the extent to which the availability of preferential rates, and the political nature of postal ratemaking in general, attracted lobbyists into the ratesetting process and invited the abuses that not infrequently result from their influence. A major thrust of the postal reform effort therefore was to minimize this attraction of lobbyist influence by severely curtailing the broad discretion that had characterized prior ratesetting procedures and served to shield abuses of the system.[27]

To carry out this policy, the court said, the Senate approved ratemaking language imposing "severe limitations" "severely curtailing" to an "extreme degree" agency discretion in assigning costs and fixing postal rates.[28]

Although Congress did remove itself from direct control over postal ratemaking, patronage, and other postal matters, it did not impose "severe limitations" "severely curtailing" to an "extreme degree" the authority of the Postal Service and the Postal Rate Commission to set postal rates.[29] The purpose of the Postal Reorganization Act – of the whole postal reform movement – was to place the postal system outside normal government structure in order to cure the "no control" maladies described by Postmaster General Larry O'Brien and Representative Tom Steed in 1967.[30] Rather than "severely curtailing" the

---

[27]569 F.2d 588.

[28]569 F.2d 588, 589.

[29]569 F.2d 588, 589.

[30]Quoted in the *Senate Report*, page 3, *Legislative Appendix*, 296.

Postal Service's authority, the Act made inapplicable to the Postal Service a whole host of laws governing executive agencies and delegated broad authority to set postal rates, bargain with employee unions, contract, and operate outside of the annual budget and appropriation process, the competitive civil service system, and the control of the White House.[31]

The Senate Committee, which the court considered the creator and protagonist of "cost-of-service principles," went much farther than the Administration or the House of Representatives in delegating authority. Far from "severely curtailing" agency discretion, the Senate vested broad advisory powers in the Postal Rate Commission. In mail classification, the Senate bill abolished all existing statutory preferences and all existing classes of mail, vesting in the Commission the duty to recommend to the Governors a classification system based on the classification criteria in the Act.[32] The Committee said:

> The Postal Rate Commission, established under Chapter 37, has the full authority without limitation and subject only to the general guidelines and policy of the act to establish classes of mail subject to the approval of the Governors of the Postal Service. If the Commission in its assessment of the public interest determines that newsletters mailed by a church are, in fact, of such social benefit that they should pay less than a newsletter sent by the chamber of commerce, then the Commission is fully authorized to recommend a class recognizing that distinction and a rate in accordance with that preference.[33]

The Administration strongly opposed the Committee's broad delegation to the Commission and twice attempted to substitute the House-passed bill for the Committee bill. Senator Fannin, a

---

[31]The exclusion from other laws is 39 U.S.C. 410; the general and specific powers of the Postal Service are prescribed in 39 U.S.C. 403 and 404. The separate personnel system is 39 U.S.C. 1001.

[32]39 U.S.C. 3623(a).

[33]*Senate Report*, page 11; *Legislative Appendix*, 304.

Committee member and advocate of the Administration position, attacked the Committee bill:

> This amounts to one of the most fantastic delegations of congressional powers that I have ever heard of . . . . It not only constitutes an invitation to discontinue many important existing preferences — such as the nonprofit organizations — but it opens the new authority to unprecedented pressures from business mailers who will want to prove their entitlement to preferred rates. For the ratemaking authority is not just free to dispense its preferences to nonprofit groups; it can dispense them to anyone and its discretion to do so is virtually unlimited.[34]

In delegating ratemaking power to the postal agencies, the Senate Committee declined to recommend a particular costing methodology and declined the Administration's proposal to establish a "floor" for cost recovery prescribed by law. Instead, the Committee envisioned a breadth of agency discretion free of specific congressional restrictions:

> [T]o achieve true postal reform, as almost every witness before the committee has pledged himself to do, postal rates of [the] past, as they are reflected in the provisions relating to mail classification and postal rates, must be made subject to change . . . . [N]o particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost. That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law.[35]

The Administration also opposed this Committee proposal. Senator Bellmon, a Committee member, stated the Administration's case:

---

[34] 116 *Congressional Record* 22053; *Legislative Appendix*, 355.

[35] *Senate Report*, pages 12, 17; *Legislative Appendix* 305, 310.

> The [Senate] committee bill also fails to require that the rates for each class of mail at least produce the revenues needed to pay its demonstrably related costs, that is, the extra costs resulting from the existence of that service. Under the [House-passed] substitute these reduced rates classes, based on social policy considerations could only be created by Congress.[36]

The Administration's efforts to defeat the Committee bill on the Senate floor failed,[37] and the bill which the Senate took to conference, far from "severely curtailing the broad discretion that had characterized prior ratesetting procedures" would have granted extremely broad classification and ratemaking powers to the postal agencies subject only to the "general criteria enacted by law."[38]

C. The D.C. Circuit Misinterpreted the Senate Report and Distorted the Language of the Conference Report.

In specific support of its contention that Congress acted to impose "severe limitations" on agency discretion, the court quoted the Senate Committee Report accompanying S.3842. The Committee said:

> Most of the money in the postal system comes from first class mail. A 100% increase in the rate for all second class mail would not produce as much revenue as a 5% increase in the first class rate. The temptation to resolve the financial problems of the post office by charging the lion's share of all operational costs to

---

[36] 116 *Congressional Record* 22050-22051.

[37] The Administration proposals to substitute the House-passed bill for the Committee bill failed in two roll call votes, 48-41 and (on a motion to table) 47-43. 116 *Congressional Record*. 22056, 22371.

[38] 569 F.2d 588; *Senate Report*, page 17, *Legislative Appendix*, 310.

> first class is strong; that's where the big money is. The necessity for preventing that imposition upon the only class of mail which the general public uses is one of the reasons why the Postal Rate Commission should be independent of operating management.[39]

The use of this portion of a paragraph, taken out of context, misrepresents the issue the Committee was addressing. Taken in or out of context, the statement does not support the contention for which the court selected it. The subject was *not* agency discretion, the subject was the Committee's desire to remove the ratemaking process from the immediate concerns of postal deficits and wage settlements. The background leading to the Committee's statement was this:

On April 6, 1970, one day after the postal strike was settled, President Nixon asked Congress to enact legislation raising the price of a first-class stamp from 6 cents to 10 cents, raising second-class 12 percent and third-class 5 percent, increases which, the President said, would "wipe out the postal deficit."[40] The "deficit" included the cost of the Administration's promise of an immediate 14 percent pay increase for postal workers. Congress did not respond favorably to the President's rate proposal, so ten days later, the President sent a second message, retracting the 10 cent proposal, saying, "Understandably, the proposed increase met with limited enthusiasm." This time the President proposed an 8 cent stamp, raising second-class 50 percent and third-class 33 percent.[41]

On April 23, 1970, the Postmaster General appeared before the Senate Committee to discuss the agreement between the Administration and the postal unions. The subject quickly turned

---

[39]569 F.2d 588, footnote 65.

[40]Message from the President of the United States, April 6, 1970, 91st Congress, House Document 91-298, page 2.

[41]Message from the President of the United States, April 16, 1970, 91st Congress, House Document 91-313, page 5, *Legislative Appendix, 194.*

to the Administration's widely fluctuating rate proposals. The Postmaster General at first denied that the 10 cent stamp had ever been proposed, then later justified the revised proposal on the basis of "new" figures.[42] The Committee apparently considered this policy flip-flop a choice example illustrating the need for an independent agency to recommend rate increases.

The sentence in the Senate Committee report preceding the part quoted by the court, which the court omitted from its opinion, makes the Committee's point clear:

> The recent proposal for a 10-cent first-class stamp in order to raise sufficient revenue to balance the books of the Post Office in one single step is fair proof of that quest for catching up with costs.[43]

The most distorted use of legislative history in *NAGCP I* was the court's reliance upon the Statement of Managers in the Conference Report to support its contention that the House and Senate conferees meant for cost attribution to

> extend beyond minimally attributable costs and to include to a significant extent those additional costs which, although not measurably variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service.[44]

The definition of attributable costs in the Statement of Managers actually says:

> . . . costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than

---

[42]*Senate Hearings,* pages 1417-1419.

[43]*Senate Report*, page 13; *Legislative Appendix,* 306.

[44]569 F.2d 586.

variable, are the consequence of providing the specific service involved.[45]

To fit the managers' statement into the court's mold, the essential word "specific" was deleted and the phrase "vary over the short term in response to changes in volume" was ignored. How the court divined that the conferees intended "to include to a significant extent" nonvariable costs in the face of "specific" fixed costs is unknown. However the court's mind worked, the use of the conferees' definition of short-run, volume-variable costs in support of the court's "cost-of-service principles" can hardly be described as judicial restraint.

III.

THE CORRECT INTERPRETATION OF THE SENATE BILL AND THE RESOLUTION OF THE ISSUES IN CONFERENCE.

A. The Court Misinterpreted the Costing Language of the Senate Bill.

The D.C. Circuit's interpretation of the Senate's costing language and its conclusion that "At conference, the Senate's version was adopted"[46] is puzzling not only because both are mistaken but because the court ignored so much to reach the conclusion. The court not only ignored the Senate's rejection of United Parcel's amendment and other costing language, but construed the Senate language to mean that which the Senate Committee said it did not mean.

As enacted by the Senate, the costing language of S. 3842 provided:

---

[45]Conference Report, to accompany H.R. 17070, U.S. House of Representatives, 91st Congress, House Report No. 91-1363, August 3, 1970, page 87, *Legislative Appendix, 334.* Hereinafter cited as *Conference Report.*

[46]569 F.2d 586, footnote 59.

> Operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service.[47]

The court described this language to require:

> [E]ach mail class or postal service, in addition to bearing "operating costs" – which one might reasonably equate with attributable costs – would also have been required to bear some portion of "overhead" and "other institutional costs of the Postal Service" at least to the extent that a cause and effect relationship between those costs and the mail class or postal service to which they were to be assigned could properly be determined.[48]

The court's interpretation is incorrect. The Senate bill did not *require* any class of mail to recover any particular level of cost. The absence of a minimum level of cost recovery in the Senate bill was a principal difference between the House and Senate bills. The Senate bill not only did not require a minimum, but delegated to the Postal Rate Commission the authority to recommend the appropriate minimum and to recommend rates *below* that minimum if the Commission determined there was a sufficient "social benefit" in granting the preference.[49] The Senate committee's failure to require a minimum was a focal point of Senator Bellmon's and Senator Fannin's opposition to the committee bill.[50] In complete contrast to the court's interpretation that the Senate bill required any class to bear operating costs plus "some portion" of other costs, the Senate

---

[47]S.3842, § 3704(g)(3), *Legislative Appendix*, 236.

[48]569 F.2d 586, footnote 59.

[49]*Senate Report*, page 11, *Legislative Appendix, 304.*

[50]116 *Congressional Record* 22050-22053.

committee specifically rejected that approach in saying "no particular classification of mail is required to recover a designated portion of its cost beyond its incremental costs."[51] The committee's specific statement rejecting a requirement for the recovery of *any portion of overhead* should be sufficient proof of the committee's intent.

In comparing the costing language of the House and Senate bills in conference, the court said:

> The Senate Bill required a reasonable allocation of all costs, including institutional costs, whereas the House Bill provided only that each class of service would bear "at least those costs demonstrably related to [it]."[52]

The court failed to distinguish properly this essential difference between the Senate and House bills: The Senate bill *required* nothing; the House bill *required* that each class pay "at least" its "demonstrably related" costs. The court's interpretation not only misconstrued the Senate bill but denigrated the existence of the statutory requirement in the House bill.

B. The Standards of the House Bill, Not the Senate Bill, were "More Stringent".

The court described the ratemaking standards in S. 3842 as "more stringent than those proposed in the House Bill."[53] The statement is incorrect. The Senate's standards were less "stringent" because they required nothing while the House minimum rate level required a recovery of demonstrably related costs.

---

[51] *Senate Report*, page 17, *Legislative Appendix*, 310.

[52] 569 F.2d 588, 589.

[53] 569 F.2d 589.

The *noncost* factors in the Senate bill were "more stringent" than the House bill because the House bill left the identification of noncost factors entirely to the discretion of the Postal Service. The Senate specifically enumerated seven noncost factors and permitted the Postal Rate Commission to consider other factors as the Commission might determine.[54] Generally, however, the noncost factors listed in the Senate bill were similar to the noncost factors discussed by the Postmaster General as being appropriate for allocating the institutional cost of the postal system,[55] and in any case the Senate's noncost factors did not establish a statutory minimum level of cost recovery as was required in the House bill.

C. The House, Not the Senate, Prevailed in Conference on the Two Important Ratemaking Issues.

The court's interpretation of the results of the conference on the Postal Reorganization Act was this:

> At conference, the Senate's version was adopted with an amendment that strengthened the role of [the ratemaking provisions of the Senate bill] . . . . In exchange for the retention of the enumerated preferences, the House accepted the Senate's standards for allocating costs.[56]

The court was wrong in its conclusions on both issues. First of all, neither the "Senate's version" nor the "House's version" was adopted in conference. The Conference Report was a new bill written in conference which was "a substitute for both the House bill and the Senate amendment."[57] Section 3622(b)(3) was entirely new language which incorporated the basic princi-

---

[54]S.3842, § 3704(g)(8) *Legislative Appendix,* 264.

[55]*Senate Hearings,* page 506.

[56]569 F.2d 586, footnote 59.

[57]*Conference Report,* page 79, *Legislative Appendix, 326.*

ple of the Administration's proposal and the House bill: A statutory minimum level of cost recovery for each class of mail.

The significance of the conference agreement was that the Senate surrendered a major element of authority it had hoped to vest in the "independent" Postal Rate Commission.[58] In agreeing to the House provision that the *statute* would required a minimum level of cost recovery, the Senate yielded on its basic principle that the postal agencies should determining the appropriate level of cost recovery.

The Senate also yielded to the House on the only other important difference in ratemaking principles, the rates for small town newspapers and non-profit organizations. The compromise reached was that the statutory preference for these mailers would, as the House proposed, be preserved by statute but the postal agencies would be permitted to fix these rates to recover not more than the minimum level of cost recovery applicable to ordinary classes of mail.[59] By establishing "direct and indirect postal costs attributable" as the general statutory minimum level of cost recovery, and by making that minimum level the *maximum* level of rates for mailers preferred by statute, the conferees preempted the issues of the status of the preferential classes of mail, the choice of costing methodology, and the minimum level of cost recovery. The Senate bill would have permitted the new postal agencies to decide all of these issues; instead, all three issues were resolved by Congress in the Act.

---

[58]As well as much of its "independence." In conference, the Governors were given final authority over the Commission's operating budget, and the Commission's power to prevent the Postal Service from reducing service levels on a broad scale was reduced to the issuance of an "advisory opinion." 39 U.S.C. 3604(c), 3661. (Compare the statutory language to sections 3702(c) and 3706 of S.3842, as enacted by the Senate.)

[59]39 U.S.C. 3626.

D. The Senate Considered Incremental Costs To Be The Appropriate Minimum Level of Cost Recovery.

Although section 3704(g)(3) of S. 3842 contained more words than its House counterpart, the Senate Committee envisioned – but did not impose – "incremental cost" as the appropriate minimum level of cost recovery.[60] In the Senate hearings, Senator McGee distinguished between "incremental costs" and "demonstrably related costs." The Magazine Publishers Association's witness proposed that incremental costs be adopted as a *maximum* level for second class rates. Senator McGee replied:

> In your endorsement of the proposed reorganization plan, you entertain a very strong reservation about it, namely, that the class of mail users which you represent, basically the second class, pay only their incremental cost, which is rather strongly opposed to the Kappel Commission recommendation.[61]

On another occasion, speaking to the Postmaster General, Senator McGee discussed the cost coverage of third-class mail:

> The Chairman. . . . [T]hey cover their direct costs and contribute to institutional costs at the present time?
>
> Mr. Blount. Yes.
>
> The Chairman. That raises a question as to the cost allocation. Assume that you have a nationwide postal distribution system that is already going because it is carrying first-class mail. Now, taking the narrowest concept, the additional costs of bulk mail lead to the conclusion that it pays its way on that basis. Does that

---

[60] *Senate Report,* page 17, *Legislative Appendix,* 310.

[61] *Senate Hearings,* page 657. Senator McGee found the proposal to make incremental costs the *maximum* rate level for second-class "a little bit loaded," *ibid.*, page 663.

explain your concluding statement in regard to third-class bearing the direct costs?

Mr. Blount. I want to be very careful to state, as I did before, that we don't have completely reliable data in this regard. I am speaking simply of the direct costs of handling that mail, which may or may not include all of the demonstrably related costs . . . . I don't have sufficient figures to say that third-class mail covers it demonstrably related cost, but we do think it covers its direct cost.[62]

During the testimony of United Parcel Service's witness, the Senate Committee's chief counsel described "demonstrably related costs" as "incremental costs plus something, as the Postmaster General has suggested."[63]

Assistant Postmaster General Hargrove carefully distinguished between "incremental costs" and "demonstrably related costs" in testimony before the House Subcommittee on Postal Rates. He said:

On occasion I am asked why we do not call these costs "incremental" rather than "demonstrably related.". . . Incremental costs precisely relate to those costs associated with the next increment of a product or service. Thus, if we are producing 50 units, the incremental cost of the next 10 units would be the cost associated with only those additional 10 units. Obviously the costs of increments vary depending upon the capacity of existing plan and other factors. Despite this precise definition, however, most people use the term "incremental costs" to refer to the total added costs of a particular product or service. They vary with volume or with the specific necessity

[62] *Senate Hearings*, pages 511-512.

[63] *Senate Hearings*, page 709.

> to incur fixed costs because of the product. When used in this less precise sense, incremental, added, and demonstrably related costs are just about synonymous.[64]

The Senate Committee was using a precise term in its Report when it stated that the minimum level of cost was "incremental cost."[65] The House language, "demonstrably related costs," or as Assistant Postmaster General Hargrove described it, the "*total* added costs of a particular product or service," required a higher level of cost recovery than the minimum level considered appropriate by the Senate.

E. The Language in Section 3622(b)(3) Was Derived From the House Bill and the Definition of "Demonstrably Related Costs" in the Department's Revenue and Cost Analysis.

The two postal ratemaking issues of substantial importance to the conferees were (1) the rates made applicable to thousands of small newspapers and hundred of thousands of nonprofit organizations who had enjoyed preferred status for many years, and (2) whether the statute or the postal agencies would determine the minimum level of cost recovery. The Administration had originally proposed that Congress continue preferred status for nonprofit mailers, and had also originally proposed that the statute prescribe the "demonstrably related cost" minimum level for rates. The House of Representatives had enacted those proposals. The Senate yielded to the House and the Administration on both issues in conference. The conferees then assigned the task of drafting the language of section 3622(b)(3) to the staff.[66]

---

[64]Hearings, Postal Rates and Revenues and Cost Analysis, Committee on Post Office and Civil Service, U.S. House of Representatives, 91st Congress, page 203. Hereinafter cited as *Revenue Hearings.*

[65]*Senate Report,* page 17, *Legislative Appendix,* 310.

[66]Opinion and Recommended Decision, Postal Rate Commission, R80-1, Volume 2, Appendix B, page 11.

The three staff members to whom the conferees assigned the task of drafting section 3622(b)(3) were Mr. Hargrove, the Senate's chief counsel, and the Post Office Department's general counsel. There is no evidence indicating that these three staff members foisted upon the conferees a costing methodology opposed by the Administration and previously rejected by both Houses. It is therefore reasonable to assume that they drafted new language to reflect the conferees' agreement and to resolve the difference between the Senate's concept of "incremental" costs, and the House's "demonstrably related costs."

As the Senate was finally agreeing to the enactment of a minimum rather than prescribing general guidelines for the postal agencies, the word "requirement" was used to emphasize that the statute, not the postal agencies, prescribed the minimum. The broader term "direct and indirect," reflecting the "total added costs" concept described by Mr. Hargrove and lifted out of the definition of "demonstrably related costs" in the Revenue and Cost Analysis Report was chosen. The adjective "attributable" was used rather than "demonstrably related" perhaps because it reflects greater precision and less discretionary judgment than "assignable,"[67] and perhaps because "demonstrably related" had been innocently but odiously connected with the 10¢ stamp and "socially acceptable" rate increases.[68]

To provide an authoritative definition of the statutory language, the conferees wrote into the Statement of Managers accompanying the Conference Report the "short run, volume variable" definition of "direct and indirect" attributable costs.

---

[67]A distinction which the D.C. Circuit noted, 569 F.2d 587, footnote 59.

[68]On April 23, 1970, Assistant Postmaster General Hargrove had justified the 33 percent increase in third-class rates on the grounds that "junk mail" did not have a favorable "social acceptance." *Revenue Hearings,* page 40. The Senate Committee responded to Mr. Hargrove's statement in its Report by saying ". . . .if postal

Although the Statement of Managers was signed only by House Managers, the Statement of Managers was the only explanatory document printed by the conference and had been used as means of explaining conference agreements since the year 1880.[69] In explaining the conference resolution of the preferential rate issue, the conferees said in the Statement that nonprofit organizations would pay "postal costs for such mail excluding any portion of overhead or institutional costs."

In a more detailed definition, the Statement said:

> The provision in the conference substitute with respect to costs attributable to a class of mail or type or service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs. [70]

Returning to their respective Houses, Representative Udall gave a detailed statement of the conferees' intent in the costing language. In the Senate, Senator McGee's only reference to any aspect of postal ratemaking was to say that small town newspapers and the specified nonprofit organizations would pay "actual costs, excluding any overhead." [71]

---

rates. . . .are going to be established on a basis of . . . "social acceptability," then Congress is clearly better qualified to make such judgments. . . ." *Senate Report,* page 11, *Legislative Appendix,* 304.

[69]*Constitution, Jefferson's Manual, and Rules of the House of Representatives of the United States,* 97th Congress, House Document 96-398 (1981), page 599.

[70]*Conference Report,* pages 86-87; *Legislative Appendix,* 333-334.

[71]116 *Congressional Record* 27606, 26954.

Petitioners' attack upon the validity of Representative Udall's statement and the Statement of Managers on the grounds that the House did not prevail, Mr. Udall did not speak first, or that the House managers printed the Statement unbeknownst to the Senate conferees is not a very realistic argument. "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived."[72] United Parcel Service and NAGCP give little credit to the political and legislative experience of the Senate conferees or the integrity of the House conferees. The Statement of Managers accompanying the Conference Report reflects their use of the Statement to express joint intent. The discussion of collective bargaining, employment provisions applicable to postal supervisors, preferential mail, and the salary increase for postal employees specifically demonstrate that the document was jointly agreed upon.[73] There really never was a legitimate question about the validity of the Statement of Managers. The whole idea was conceived in the mind of the Chief Administrative Law Judge of the Postal Rate Commission, who did not like the way Congress authorized the Postal Service and the Postal Rate Commission to fix postal rates. Attacking the Statement gave him an excuse to impose *his* way.

CONCLUSION

The D.C. Circuit's decision in *NAGCP I* would inevitably eliminate the exercise of reasonable agency discretion within statutory guidelines in setting postal rates. The Chief Administrative Law Judge's attribution and assignment of 100 percent of transportation costs in the rate proceeding upon which *NAGCP I* was based is precisely the kind of maximum use of

---

[72] *U.S.* v. *Fisher*, 2 Cranch, 358, 386 (1805).

[73] *Conference Report*, pages 82, 83, 86, and 89.

cost-of-service principles which the D.C. Circuit approved.[74] The broad discretion which Congress intended to vest in the postal agencies would be eliminated under such a cost allocation system. Mail users able to seek other methods of distribution would take their business elsewhere, leaving the increasingly heavy burden of institutional costs to be borne by first-class mail and other captive customers. Neither the American public nor Petitioners in this proceeding, who today profitably serve parcel markets and sell greeting cards for people to mail at the post office, would long benefit from that result.

The Second Circuit's interpretation reflects accurately Congress's intent. If affirmed, the postal agencies would be able to allocate costs in the manner envisioned by Congress and for the benefit of all mail users. The noncost standards of the law could be effectively utilized to ensure that competitors like United Parcel Service and customers like people who buy greeting cards would be adequately protected in the pricing process.

The Second Circuit's decision in *Newsweek, et al. v. United States Postal Service* should be affirmed.

Respectfully submitted,

DAVID MINTON
Counsel of Record
Loomis, Owen, Fellman & Howe
2020 K Street, N.W.
Washington, D.C. 20006
(202) 296-5680

[74] 569 F.2d 583-585.

Respondent's Brief

5

Office - Supreme Court, U.S.
FILED
SEP [illegible]
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF OF RESPONDENTS MAIL ORDER ASSOCIATION OF AMERICA, PARCEL SHIPPERS ASSOCIATION, AND THE READER'S DIGEST ASSOCIATION, INC.

TIMOTHY J. MAY
Counsel of Record
Parcel Shippers Association, Inc.
The Reader's Digest Association, Inc.

DAVID C. TODD
Counsel of Record
Mail Order Association of America
Attorneys for Respondents
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Was the Court of Appeals for the Second Circuit correct in finding that § 3622(b)(3) of the Postal Reorganization Act provides for two tiers of postal costs or expenses and that neither a plain reading of the Act nor its legislative history reveal any Congressional intent to require the Postal Rate Commission to allocate postal costs or expenses to the maximum extent possible through the use of cost-of-service principles?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. UPS HAS MISCONSTRUED THE ISSUE BEFORE THE COURT	5
A. The Question Before The Court As Presented By NAGCP And UPS	5
B. The Court's Holding In Newsweek	6
II. A PLAIN READING OF § 3622(b)(3) AND OTHER PROVISIONS OF THE ACT SUPPORT THE SECOND CIRCUIT'S FINDING THAT IT PROVIDES FOR TWO TIERS OF POSTAL COSTS	9
A. A "Plain Reading" Of § 3622(b)(3) Reveals That It Provides For Two Tiers Of Costs.	9
B. The Provisions Of § 3626 Support This "Plain Reading"	11
C. Provisions Found In The Original House Bill Support The Interpretation Of § 3622(b)(3) As Providing For Two Tiers Of Costs	13
III. THE LEGISLATIVE HISTORY OF THE ACT SUPPORTS THE "PLAIN READING" THAT § 3622(b)(3) PROVIDES FOR TWO TIERS OF COSTS, AND THAT THERE IS NO MANDATE TO USE EXTENDED COSTING PRINCIPLES	14
A. The Hearings	14
1. Introduction	14
2. The Kappel Report	15
3. The House Hearings	16
4. The Senate Hearings	18
B. The Rate Provisions Adopted By The House And Senate	20
C. The Senate And House Reports	20
1. The House Committee Report	20
2. The Senate Committee Report	21

Table of Contents Continued

Page

D. The Approach To Postal Ratemaking Ultimately Adopted Was An Amalgamation Of The House And Senate Versions 23

1. Differences in the Senate and House Approaches 23

2. The Conference Report and Congressman Udall's Floor Statements are Entitled to Weight in Interpreting § 3622(3)(b) 25

3. UPS Misinterprets the Conference Report 29

E. UPS Fails In Its Efforts To Show That The Senate Favored A More Rigid Approach To Costing 30

IV. THE COURT SHOULD DEFER TO THE PRC'S INTERPRETATION OF § 3622(b)(3) 33

V. THE D.C. CIRCUIT'S INTERPRETATION OF § 3622(b)(3) IS FAULTY 34

VI. THERE HAS BEEN NO CONGRESSIONAL ENDORSEMENT OF THE D.C. CIRCUIT'S INTERPRETATION OF § 3622(b)(3) 39

VII. THE PRC HAS APPROACHED THE TASK OF DETERMINING "ATTRIBUTABLE" COSTS REASONABLY AND IN ACCORDANCE WITH THE ACT 40

VIII. THE ALLOCATION OF NON-ATTRIBUTABLE COSTS ON "COST-OF-SERVICE PRINCIPLES" IS AS SUSCEPTIBLE TO ABUSE AS APPLICATION OF THE § 3622(b) FACTORS 43

IX. THE PRC'S USE OF SERVICE-RELATED COSTS IS NOT A SIGNIFICANT ISSUE BEFORE THE COURT, AND IN ANY EVENT, THE PRC'S USE OF THE METHODOLOGY IS PROPER 45

X. THERE IS NO MERIT TO UPS'S ALLEGATIONS OF UNFAIR COMPETITION 47

CONCLUSION 49

TABLE OF AUTHORITIES

CASES: Page

American Smelting & Refining Co. v. *Occupational Safety & Health Review Commission*, 501 F. 2d 504 (8th Cir. 1974) 26

Association of Am. Pub., Inc. v. *Governors of U.S. Post. Serv.*, 485 F. 2d 768 (D.C. Cir. 1973) 35

Consumer Product Safety Comm. v. *GTE Sylvania*, 447 U.S. 102 (1980) 26, 27

Corning Glass Works v. *Brennan*, 417 U.S. 188 (1974) 28

Cudahy Packing Co. v. *Holland*, 315 U.S. 357 (1942) . 26

Davidson v. *Gardner*, 370 F. 2d 803 (6th Cir. 1966) .. 27

D.C. Federation of Civic Associations, Inc. v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1970) 27

Hardin v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968) .. 26

Montclair v. *Ramsdell*, 107 U.S. 147 (1883) 38

National Association of Greeting Card Publishers v. *United States Postal Service*, 569 F.2d (D.C. Cir. 1976) *vacated as to other issues*, 434 U.S. 884 (1977) ..... 2 *passim*

National Association of Greeting Card Publishers v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 38

Newsweek, Inc. v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981) *cert. granted*, 72 L.Ed. 2d 439 (1982) ..... 2 *passim*

Pennsylvania R.R. v. *International Coal Co.*, 230 U.S. 184 (1913) 27

Red Lion Broadcasting Co. v. *F.C.C.*, 395 U.S. 367 (1969) 40

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 28

Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) 26

Southern Pac. Transp. Co., v. *Usery*, 539 F.2d 384 (5th Cir. 1976) *cert. denied*, 434 U.S. 875 (1977) 26

Time, Inc. v. *USPS*, Second Circuit, Doc. Nos. 81-4183, *et. al*, Slip Op (July 9, 1982) 43

Table of Authorities Continued

Page

Udall v. *Tallman*, 380 U.S. 1 (1965) 32
United States v. *Fisher*, 2 Cranch 358 (1805) 27
United States v. *Price*, 361 U.S. 304 (1960) 40
United States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) 28
U.S. v. *Menasche*, 348 U.S. 528 (1955) 38
Vaughn v. *Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) 26

STATUTES:

Postal Reorganization Act of 1970, as amended, 39 U.S.C.:
§ 3622 ..... 1 *passim*
§ 3625 42
§ 3626 ..... 11, 12, 39
Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, 90 Stat. 1311 ..... 39, 40

AGENCY DECISIONS:

Opinion and Recommended Decision, PRC Docket No. R71-1 (1972) 41, 42, 48
Opinion and Recommended Decision, PRC Docket No. R74-1 (1975) 36, 41, 44
Opinion and Recommended Decision, PRC Docket No. R80-1 (1981) 42, 44, 46, 48
Opinion and Recommended Decision Upon Reconsideration, PRC Docket No. R80-1 (1981) 46, 47

LEGISLATIVE MATERIALS:

H.R. 17070, 91st Cong., 2d Sess. (1970) 13, 20, 24
H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970) 13, 20, 21
H.R. Rep. No. 1363 91st Cong. 2d Sess. (1970) 7, 8, 12, 25
Hearings on S. 3613 before the Senate Committee on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 31
Hearing on Postal Modernization before the Senate Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 18, 19

Table of Authorities Continued

Page

Hearings on H.R. 17070 before the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 18, 19

Hearings on Postal Rates and Revenue and Cost Analysis before the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 17

Hearings on Post Office Reorganization before the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 15, 16

S. 3613, 91st Cong., 2d Sess. (1970) 30

S. 3842, 91st Cong., 2d Sess. (1970) 20, 24

S. Rep. No. 912, 91st Cong., 2d Sess. (1970) 22, 23

116 Cong. Rec. 20222 (1970) 13

116 Cong. Rec. 20455 (1970) 13

116 Cong. Rec. 22315 (1970) 30

116 Cong. Rec. 26958 32

116 Cong. Rec. 26953-36955 (1970) 25

116 Cong. Rec. 26958 (1970) 32

116 Cong. Rec. 27606 (1970) 25, 29

121 Cong. Rec. 30777 (1975) 40

OTHER AUTHORITIES:

Towards Postal Excellence: The Report of the President's Commission on Postal Organization (1968) 15, 16

STATEMENT OF THE CASE

Respondents Mail Order Association of American (MOAA), Parcel Shippers Association (PSA) and The Reader's Digest Association, Inc. (RD) were parties to the Postal Rate Commission's (PRC) rate proceeding Docket No. R80-1, which gave rise to these consolidated cases. The MOAA is an organization of mail order and retail companies which make extensive use of first- third- and fourth-class mail. The PSA is an organization of mail order companies which make extensive use of third- and fourth-class mail. The RD is a company which makes extensive use of first- second- and third-class mail. Thus, the interests of respondents encompass virtually the entire spectrum of the mails. As such, they are vitally interested that the rate making provisions of the Postal Reorganization Act be interpreted properly.

Although disagreeing with a number of the conclusions, respondents generally accept the statements of the case in the briefs of the National Association of Greeting Card Publishers (NAGCP), United Parcel Service of America, Inc. (UPS), and Direct Mail/Marketing Association, Inc. (DMMA) as accurately summarizing the background giving rise to these proceedings. Respondents consider it appropriate, however, to concisely state the nature of the case before the Court.

The Postal Reorganization Act provides a procedure for the establishment of postal rates and fees. The Postal Service from time to time requests the PRC to submit a recommended decision on changes of rates. 39 U.S.C. § 3622(a). The PRC is required to make a recommended decision on the request, "in accordance with the policies of this title," and a number of "factors." 39 U.S.C. § 3622(b). One of the factors is stated as a "requirement" that each class of mail bear the postal costs "attributable" to that class plus that portion of "all other costs . . . reasonably assignable" to such class. 39 U.S.C. § 3622(b)(3). The disagreement between the D.C. and Second Circuits involves the proper interpretation of this subsection.

All agree that "attributable" costs—that portion of the total of all costs or expenses which can be traced to the classes of

mail on a causal basis—are to act as a rate "floor" for each class of mail. All also agree that there is a portion of postal costs which cannot be allocated to the classes of mail upon the basis of "costing," but must be allocated on the basis of the factors of § 3622(b)(1)-(2), (4)-(9), a "pricing" rather than a "costing" process.

The D.C. Circuit found that § 3622(b)(3) concerns exclusively "costing" and encompasses something less than the sum total of all postal expenses, i.e., that there is a residuum of non-attributable and non-assignable costs which are to be allocated to the classes in accordance with the other factors of § 3622(b).[1] The Second Circuit found that § 3622(b)(3) of the Act encompasses the sum total of postal costs and divides those costs into "attributable" costs which are to be allocated to the classes pursuant to a "costing" process, and "reasonably assignable" costs which are to be allocated to the classes of mail in accordance with the other factors of § 3622(b).[2]

The D.C. Circuit concluded that the Congress had intended to limit the discretion normally afforded to an agency responsible for setting rates. The Court found that Congress intended to limit the PRC's discretion to an extreme degree by requiring the PRC to go to extraordinary lengths to use "costing" rather than "pricing" techniques for the purpose of allocating the sum total of postal costs or expenses to each of the classes of mail. The Court also found that, for rate making purposes, § 3622(b) divides the total of postal costs or expenses into three types or tiers: (1) "attributable" costs and (2) "reasonably assignable" costs to be allocated to the classes of mail on the basis of "costing" principles, and (3) the remaining or non-attributable

---

[1] *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), vacated as to other issues, 434 U.S. 884 (1977). Hereinafter *NAGCP I*.

[2] *Newsweek, Inc.* v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981), *cert. granted*, 72 L. Ed. 2d 439 (1982). Hereinafter *Newsweek*.

and non-assignable costs, to be allocated to the classes of mail on the basis of the factors of § 3622(b) (1)-(2), (4)-(9).

Properly interpreted, however, § 3622(b)(3) divides the sum total of postal costs or expenses into only two types or tiers, those which are "attributable," which are to be allocated to the classes of mail on the basis of "costing" techniques, and "all other costs" i.e., non-attributable costs or expenses, which are to be reasonably assigned to the classes of mail in accordance with the other factors of § 3622(b).

If on the basis of a plain reading and its legislative history, § 3622(b)(3) is found to encompass all postal costs divided into two tiers, the D.C. Circuit's interpretation that "reasonably assignable" costs are to be allocated on the basis of "costing" techniques is necessarily erroneous. As the D.C. Circuit recognized, if "reasonably assignable" costs constitute the sum total of all non-attributable costs, allocating those costs on the basis of costing techniques would leave no postal costs or expenses to be allocated on the basis of the other § 3622(b) factors, which the Act obviously does not contemplate.

SUMMARY OF ARGUMENT

The essence of the dispute between the circuits is the extent to which the Congress intended to imbue the PRC with the discretion to determine the precise approach to establishing postal rates. The D.C. Circuit has infringed upon the province of the PRC by failing to give any deference to the PRC's interpretation of the Act, and more importantly, by intruding into areas entrusted to its expertise and discretion. Further, the D.C. Circuit has misinterpreted the provisions of § 3622(b)(3) of the Act.

UPS has misstated the issue before the Court as a dispute between the Second and D.C. Circuits as to whether the Act compels the use of a short-term variable approach for the purpose of determining attributable costs. The fact is that the PRC has used a longer-run variable approach to costing in every proceeding including the docket now before the Court

for review, and the Second Circuit affirmed the PRC's approach to costing.

Section 3622(b)(3) of the Act, by its clear terms, provides for two tiers of postal costs: "attributable" costs which are to be allocated to those classes of mail which caused them and "reasonably assignable" costs which are to be allocated to the classes of mail in accordance with the other factors of § 3622(b). Neither a plain reading of the Act nor its legislative history support the D.C. Circuit's interpretation that § 3622(b) provides for three tiers of costs and mandates the PRC to attribute and assign costs to the classes of mail to the maximum extent possible through the use of cost-of-service principles.

The D.C. Circuit's interpretation of the Act is demonstrably faulty. It has misread the plain meaning of the Act and misinterpreted its legislative history. The D.C. Circuit erroneously concluded that the Congressional desire to get politics out of the Postal Service evidenced an intent to circumscribe the authority of the PRC. The Congress got politics out of the Post Office by eliminating the Congressional role in rate making; not by tying the PRC to the use of a particular approach to costing and rate making.

Legislative history supports the Second Circuit's finding that there are two tiers of postal costs. It also supports the finding that Congress intended to do away with political influence by eliminating the Congressional role in the setting of rates and creating an independent PRC with the necessary expertise to establish rates in accordance with sound economic principles.

Petitioners fail in their attempt to show that there was a basic conflict between the House and the Senate over the degree to which the establishment of the costs of each class of mail should be preeminent, with the Senate favoring a more stringent approach. To the contrary, there was a Congressional recognition throughout the legislative process that the then existing costing system, which used accounting techniques to distribute costs to the classes of mail, was arbitrary

and uninformative. Legislative history demonstrates a recognition by both the House and Senate that only a portion of postal costs can be traced to the classes of mail on the basis of causality leaving a significant portion to be allocated on the basis of other factors. For this reason, the Congress went to extraordinary lengths in § 3622 (b) to provide guidance to the Commission in the allocation of the large portion of postal costs that would have to be allocated to the classes on the basis of "pricing" rather than "costing" principles.

To use, under the guise of "costing", accounting allocation techniques to distribute costs which cannot causally be traced to the classes of mail leads to arbitrary and unwise rates. The use of the criteria established by Congress to distribute noncausally traceable costs leads to a sounder rate structure to the benefit of all classes of mail and the public which uses the Postal Service.

Finally, the PRC's use of service-related costs has been affirmed by both the D.C. and Second Circuits and, therefore, is not a significant issue before the Court. In any event, the use of service-related costs is fully supported by the record and their adoption should not be disturbed.

ARGUMENT

I. UPS HAS MISCONSTRUED THE ISSUE BEFORE THE COURT.

A. The Question Before The Court As Presented By NAGCP And UPS.

The first issue which must be addressed is the nature of the question under review. The petition and the statement of the questions presented for review on brief by NAGCP state the question properly (with respect to the conflict between the D.C. and the Second Circuits) as whether § 3622(b)(3) of the Postal Reorganization Act mandates a particular approach to costing. The petition of UPS, however, misstates the question both in its petition and on brief as involving a conflict between the circuits on whether "costing" is to be limited to short-term

variable costs. There is no real conflict between the circuits with respect to that issue.

B. The Court's Holding In *Newsweek*.

The Court approved the PRC's longer-run approach to costing in *Newsweek*. The central point of the Court's holding is a finding that the D.C. Circuit was in error in concluding that the plain reading of § 3622(b)(3) and the legislative history thereof placed a mandate upon the PRC to go to extraordinary lengths in the use of essentially arbitrary allocation formulas to allocate "costs" pursuant to costing techniques to the maximum extent possible. The essence of the Second Circuit's disagreement with the D.C. Circuit is stated as follows:

> From our 'plain reading' of the statute and review of its legislative history we conclude that the D.C. Circuit erred in *NAGCP I* and *III* in holding that section 3622(b) requires the PRC to attribute and assign costs to the maximum extent possible using cost-of-service principles. *Newsweek*, at 1200.

Nevertheless, UPS devotes practically its entire brief to attempting to show that the Act, its legislative history and principles of public policy will be violated if the Second Circuit decision is allowed to stand because of UPS's conclusion that the decision mandates that "attributable" costs be limited to short-run variable costs.

This is a misreading of the decision. The PRC used longer-run not short-run variable costs for the purpose of determining attributable costs in Docket R80-1. The Second Circuit's decision is properly directed to the question of the number of tiers of costs provided for by § 3622(b)(3) and the freedom of the PRC to use costing methodologies it considers to be appropriate.

> We conclude that both the rate-making procedure followed by the PRC in R80-1 and the use of Service-Related Costs within that procedure are consistent with the provisions of 39 U.S.C. § 3622(b)(1976). However, we reject the holdings of the District of Columbia Circuit in *NAGCP I* and *III* which mandated the three-tier process used by

> the PRC in setting the present rates. The PRC is free, on remand, to continue to use those methodologies employed in the rate-making proceeding here on review, but it may, if it wishes, return to the methodologies used in the first three rate-making proceedings or develop alternative methodologies which comport with the requirements of section 3622(b), as we interpret it. *Newsweek* at 1211.

Thus, the Court explicitly finds that the PRC is free to use the methodologies used in the docket under review or in the first three proceedings. In *none* of those proceedings did the PRC adopt a short-run variable approach to costing.

Further, nowhere in the decision does the Second Circuit state that attributable costs are to be equated with short-run variable costs. UPS's conclusion that the Court makes such a finding is based upon two references to the Conference Report.[3] The Court states that the definition of the term attributable found in the Report is controlling. *Newsweek*, at 1200. The Court also found that each class of mail must bear, "as a minimum, the direct and indirect postal costs attributable to that class or service" as defined by the Report. *Newsweek*, at 1202.[4]

---

[3] H.R. Rep. No. 1363, 91st. Cong., 2d Sess. (1970) reprinted in 1970 U.S. Code, Cong. & Admin. News 3712 (J.L.A. 316ff.). J.L.A. references are to the Joint Appendix of Relevant Legislative Material.

[4] These statements by the Court must be read with other statements and explicit findings that the PRC's longer-term approach to variability is lawful. The Court refers to The Report of the President's Commission on Postal Organization (1968) (Kappel Report) to explain the origins of a minimum rate floor.

> The Commission suggested that discrimination in rates would not occur as long as each class covered 'as a minimum, *the long-run variable costs* ascribable to it—the full added costs demonstrably related to that class' (quoting from the Kappel Report, at 131). *Newsweek*, at 1199 n.8. (emphasis added)

The Court states that this suggestion was embodied in the House bill. *Ibid.*

The Conference Report does not limit attributable costs to short-run variable costs. The pertinent portion of the Conference Report states as follows:[5]

> The provision in the conference substitute with respect to costs attributable to a class of mail or type of service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs. H.R. Rep. No. 1363, 91st Cong., 2d Sess. 87 (1970), reprinted in U.S. Code, Cong. & Admin. News 3712. (J.L.A 334).

The Report cannot properly be interpreted as limiting attributable costs to short-run variable costs. It is evident that the reference to "fixed rather than variable" costs refers to the sum total of all postal costs which are not encompassed within those costs which "vary over the short-term in response to changes in volume." The Report is quite clear that these "fixed" costs as therein defined are to be attributed if they "are the consequence of providing the specific service involved." Thus, the PRC is fully authorized under the Conference Report interpretation of § 3622(b)(3) to find, through longer-run variable or other appropriate cost analyses, that particular costs are the "consequence" of providing a specific service and are, therefore, attributable.

Thus, quite aside from the fact that the statement does not define what the "short-term" is, an issue which is clearly left to the discretion of the PRC with reference to the particular nature of postal costs, the conclusion should not be drawn that the statement serves to limit the PRC's discretion to determine attributable costs.

---

[5] The extent to which the Conference Report is valid legislative history is discussed at pages 25-29 *infra*.

II. A PLAIN READING OF § 3622(b)(3) AND OTHER PROVISIONS OF THE ACT SUPPORT THE SECOND CIRCUIT'S FINDING THAT IT PROVIDES FOR TWO TIERS OF POSTAL COSTS.

A. A "Plain Reading" Of § 3622(b)(3) Reveals That It Provides For Two Tiers Of Costs.

One of the "factors" to be considered by the Commission in making a recommendation on rates and fees is:

> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type; 39 U.S.C. § 3622(b)(3).

Initially, it is evident that the term "costs" as used in the subsection is not meant to refer to "costing" as distinguished from "pricing" techniques. Rather, it is used to describe postal service "expenses." Thus, "direct and indirect postal *costs*" refers to the totality of the *expenses* of operating the Postal Service.

Giving the subsection a "plain reading" leads to the conclusion that each class of mail must bear, as a minimum, its attributable costs (those costs caused by that class of mail),[6] plus that portion of all other costs (the costs remaining after the attributable costs have been determined) which it is reasonable to assign to that class of mail pursuant to the other factors of § 3622(b). Inherent in this reading is that the section encompasses the sum total of postal costs; it divides all costs into

---

[6] Petitioner NAGCP and intervenor DMMA properly take the position that "attributable" should be given its dictionary meaning of "caused." NAGCP brief at 17, DMMA Brief at 16.

those which can be either (1) attributed or (2) reasonably assigned.[7]

Grammatically, this reading means that "that portion" refers to the amount of the non-attributable costs or expenses which are to be borne or "reasonably assigned" to each class of mail in addition to the costs or expenses found to be "attributable" to each class of mail. This reading also compels the conclusion that the "all other costs" are to be assigned to the classes on the basis of the other factors of § 3622(b) since otherwise these factors would be read out of the Act, *i.e.*, there would be no costs to be distributed in accordance with those factors.

A contrary reading which concludes that "reasonably assignable" costs are to be allocated on the basis of costing principles requires that "that portion" be read as referring to "all other costs," *i.e.*, that there is only a "portion" of the non-attributable costs or expenses which are reasonably assignable to the classes of mail, leaving some remaining costs or expenses to be allocated pursuant to the other factors of § 3622(b).

---

[7] Although UPS now takes a different approach, originally UPS gave a "plain reading" to § 3622(b)(3) identical to the above. In its brief in PRC Docket No. R74-1 UPS stated as follows:

> UPS believes that [the] 'two-tier' interpretation is correct. The reason is that if, as UPS contends, all costs which are directly or *indirectly* a consequence of providing a given class of service are considered to be attributable, any residue cannot by definition be causally related on a cost basis with any of the various classes of mail provided. Accordingly, we conclude that Congress viewed the factors listed in § 3622(b) as reasonable criteria for assigning the residual or nonattributable costs, providing through the 'plus' clause of § 3622(b)(3) that those other factors be applied reasonably in assigning the nonattributable costs to the classes of mail. UPS Brief, printed record, Action of the Governors under 39 U.S.C. Section 3622, and Supporting Record in the Matter of Postal Rate and Increases, PRC Docket No. R74-1, Vol. 2, Part II, 2-533. (emphasis in original)

Although the latter is a conceivable construction on the basis of a "plain reading," it is considerably more strained. First, it does not give a parallel reading to the two parts of the subsection. "Attributable" clearly refers to the sum total of all postal costs, *i.e.*, both the direct and indirect costs. A parallel reading would require that "reasonably assignable" be construed to refer to the sum total of the "all other costs" or non-attributable costs. Second, the three-tier reading necessarily requires an interpretation tantamount to reading the section to state that there is a requirement that each class of mail shall bear the direct and indirect costs "attributable" or "reasonably assignable" to that class. Therefore, the reading renders the "plus" clause superfluous. Since the direct and indirect costs encompass the sum total of all costs, there would be no need to establish a second category of costs if all that was intended was that costs be either "attributed" or "reasonably assigned" on the basis of "costing" techniques.

B. The Provisions Of § 3626 Support This "Plain Reading."

The conclusion that "all other costs" as used in § 3622(b)(3) refers to the sum total of all postal costs which are not "attributable" rather than being limited to only a portion of the non-attributable costs which are "reasonably assignable" is supported by the provisions of § 3626(a)(1) which limits the amount of costs to be borne by certain types of mail.

> (1) the revenues received from rates for [certain types of mail] shall not . . . exceed the direct and indirect postal costs attributable to mail of such class or kind (excluding all other costs of the Postal Service); 39 U.S.C. § 3626(a)(1).

Without argument, this section divides postal costs into two tiers and uses the identical "all other costs" phrase found in § 3622(b)(3) to do so. It is inappropriate to give a phrase one meaning in one section and another meaning in another section, particularly since the wording of both sections emerged from the Conference Committee as a compromise between the Senate and House approaches.

The legislative history of § 3626 establishes that its purpose was to relieve certain classes of mail from the burden of paying the "institutional" costs of the Postal Service, *i.e.*, those costs or expenses which cannot be identified with particular classes by the application of *costing* techniques. Although Congress made the judgment that these types of mail should not have to pay the institutional burden of the Postal Service, it also intended that these types of mail were to be charged with all costs which could be identified as having been caused by such mail, *i.e.*, "attributable" costs.[8]

Therefore, to interpret the "reasonably assignable" language of subsection 3622(b)(3) as referring to a costing approach would be directly contrary to the Congressional intent that even the preferred classes of mail provided for by § 3626 were to bear all costs which could be traced to those classes. The allocation of "reasonably assignable" costs is just as much a "costing" methodology as is the "attribution" of costs, as the former term has been interpreted by the D.C. Circuit. However, § 3626, by its terms, does not permit the allocation of costs to these classes of mail except for those costs which are found to be "attributable." If the "reasonably assignable" language requires the application of costing techniques, we find ourselves in a conundrum in which the intent of Congress that the § 3626 classes bear all costs which can be traced to those classes could not be fulfilled. Identical language in two subsections dealing with ratemaking should be given identical interpretations. Attributable costs are the only kinds of costs that are to be determined on the basis of costing principles. "All other costs" are to be reasonably assigned on the basis of the other § 3622(b) factors.

---

[8] The conference substitute adopts the Senate provision with an amendment which provides that revenues from rates on nonprofit preferred rate mailings shall not, after 10 years, exceed postal costs for such mail excluding any portion of overhead or institutional costs. H.R. Rep. 91-1363, 91st Cong. 2d Sess., 86 (1970). (J.L.A. 333).

C. Provisions Found In The Original House Bill Support The Interpretation Of § 3622(b)(3) As Providing For Two Tiers Of Costs.

Legislative history provides a basis for determining the origin of the term "all other costs." As reported by the House Committee, H.R. 17070 contained a provision requiring special costing and rate treatment for parcel post.

> (f) Notwithstanding any other provision of this title, fourth-class parcel post service shall bear, in addition to those costs demonstrably related to such service under subsection (c) of this section, such portion of *all other costs* incurred by the Postal Service (including, without limitation, costs described in the second sentence of subsection (b) of this section) as will assure that the revenue of such service will not be less than the cost thereof, determined under this subsection, by more than 4 per centum and will not be greater than the costs thereof by more than 4 per centum. H.R. 17070, 91st Cong., 2d Sess., § 1201(f) (1970), 116 Cong. Rec. 20222. (J.L.A. 342). (emphasis added) *See* also H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 40-41 (1970).

This provision is pertinent in two respects. First, it is yet another indication that Congress considered there to be two types of costs "demonstrably related" and "all other costs." Second, since it is clear that in § 1201(f) the phrase "all other costs" referred to all of those costs which could not be "demonstrably related" to the classes of mail, it is entirely logical and consistent to give the same interpretation to the phrase "all other costs" as found in § 3622(b)(3) as ultimately adopted by the Congress.[9]

---

[9] During consideration by the House an amendment was adopted deleting section 1201(f). In support of the amendment Congressman Johnson stated:

> We are now establishing a new Postal Service to establish a new organization to run the Post Office into the next century. I do *not feel that the rate board should have their hands tied with respect to any class of mail.* 116 Cong. Rec. 20455. (J.L.A. 343) (emphasis added)

III. THE LEGISLATIVE HISTORY OF THE ACT SUPPORTS THE "PLAIN READING" THAT SECTION 3622(b)(3) PROVIDES FOR TWO TIERS OF COSTS, AND THAT THERE IS NO MANDATE TO USE EXTENDED COSTING PRINCIPLES.

A. The Hearings.

1. Introduction.

During the legislative consideration of the Postal Reorganization Act and in particular in the coloquies that occurred between witnesses for the Post Office and members of the committees considering the legislation, two principle themes emerged. First, was the recognition that the then existing costing system, a fully allocated cost system, was defective and should be replaced by a system which traced actual cost causality to the various classes and types of mail. Second, postal costs, properly measured, consist of: (1) those costs which can be shown to have been caused or are the consequence of particular classes of mail, and (2) a large segment of remaining or institutional costs which do not result from handling a particular class of mail but represent the cost of maintaining the postal system. Both of these facts are of significance in interpreting § 3622(b)(3).

There is no hint in any portion of the legislative history that Congress considered dividing postal costs into three segments. Costs were always divided into two parts, *i.e.*, "caused" costs and "institutional" costs. Equally important is the fact that there is no indication that the institutional costs of the Postal Service should be allocated on the basis of cost accounting or cost-of-service formulas. To the contrary, the constant theme is that the mere allocation of these costs on the basis of volume measures is neither helpful nor informative and leads to wrong economic decisions.

Thus, the legislative history supports strongly the proposition that § 3622(b)(3) provides for two rather than three tiers of postal costs and that the "reasonably assignable" language is intended to incorporate the other factors found in § 3622 rather than to suggest, as the D.C. Circuit has found, some increased

emphasis upon costing, even if the necessary facts and economic data are not present to permit such costing to be performed on a rational basis.

2. The Kappel Report.

The Report of the President's Commission on Postal Organization (1968) (Kappel Report) was an important backdrop to the development of the Postal Reorganization Act.[10] First, the Report recognized the shortcomings of the then existing system of determining postal costs.

> The Post Office uses a Cost Ascertainment System, authorized by a 43-year old statute, for determining the revenues, volume and cost of each class of mail. For determining costs it uses the 'fully-allocated' method through which every postal expense is charged to some class of mail or special service. A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary, but uninformative. *Kappel Report, Ibid* at 30. (J.L.A. 004).

Another statement lends strong upport to the proposition that § 3622(b)(3) was intended by the Congress to provide for only two types of costs. In making its recommendation on modifying the method of postal rate-making the report states:

> Congress would establish broad policy criteria for setting postal rates under which rates for a given class of mail would cover the costs demonstrably related to that class of service. Revenues from each class must cover the full additional costs of providing the service, including the cost of being prepared to handle future increases in volume. Remaining institutional costs would not be apportioned to the several classes of mail by rigid accounting formulas.

---

[10] *See, e.g.* Hearings on Post Office Reorganization before the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess., 183 (1969). (J.L.A. 056)

> Rather, for pricing purposes management would apportion these costs to the various classes on the basis of its judgment of such market factors as differences in the nature of the various services provided and differing demand characteristics. Kappel Report at 61-62. (J.L.A. 006, 007).

3. The House Hearings

At an early hearing concerning postal reform, then Postmaster General Blount stated with respect to ratemaking:

> We have instituted a system of cost accounting to help us determine what the directly attributable costs are of each class. No such system is in existence at the present time. Hearings on Post Office Reorganization before the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess., 210 (1969). (J.L.A. 058).

Subsequently, PMG Blount stated:

> Except for free and reduced-rate mail, no postage rate would be set at a level below demonstrably related costs for the particular class or subclass involved. This provides a floor upon which a rate can be built to recover not only the demonstrably related costs, but also an appropriate amount of the remaining costs not traceable to any one service. *Ibid*, at 332. (J.L.A. 061).

During those same hearings, Assistant Postmaster General for Finance, Mr. Hargrove, expanded upon the definition of "demonstrably-related costs."

> Generally speaking, it would be comparable to what we would call incremental costs, Congressman. However, there are some costs which are indirect in nature that can be demonstrably shown to be related to a particular class. So that this type of an indirect cost, if demonstrably related to a class, would also be included in the floor that we are talking about. *Ibid*, at 342. (J.L.A. 063).

The hearing record is replete with references which make it clear that the Congressional Committees considering the legislation were well aware that postal costs were to be divided into two categories with only the first category to be determined on the basis of costing methodologies and the second or institutional category to be assigned on the basis of pricing

factors. The costs that could be related to each class were to be the minimum to be recovered by the rate for that class of mail.[11]

Included in the hearings is a Post Office report which defines demonstrably related costs and institutional costs as follows:

> *Demonstrably related costs.*—Those costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.
>
> * * *
>
> *Institutional costs.*—Costs which are not directly responsive to changes in postal volume and which are not the consequence of providing a specific class, subclass, or category of service. Institutional costs are the total costs of the postal service, less demonstrably related costs. Hearings on Postal Rates and Revenue and Cost Analysis before the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess., 1-13 (1970). (J.L.A. 130).[12]

---

[11] See 1969 House Hearings, *Ibid*, at 359, 612, 621-622, 634, 1251, 1273 (J.L.A. 064, 071, 072-073, 074, 090-091).

[12] In describing that report PMG Blount testified as follows:

> One of the things that we have done with this report, Mr. McClure, is to try to present for the Congress, as well as for ourselves, a much more understandable picture of what the costs of moving the mail are. Under the so-called cost ascertainment system previously used they had what was called fully allocated costs. We felt that 'fully allocated costs' did not present a clear and true picture of what it really costs to move the mail. We have attempted here to set out very clearly what the demonstrably related costs were for handling each of the classes of mail, setting aside the institutional costs that are not attributable to any one class alone.
>
> Now, in ratemaking there are many things that come into the decision what is an appropriate rate for a particular class. And I do not believe that it is appropriate ratemaking philosophy just to distribute institutional costs on a percentage basis to all of the

4. The Senate Hearings.

The same theme was developed in the Senate Hearings. PMG Blount testified that certain rate policies were "fundamental" including the following:

> The rates for each class of mail should cover, as a minimum, the costs demonstrably related to carrying that class of mail. Hearings on Postal Modernization before the Senate Committee on Post Office and Civil Service, 91st Cong., 1st Sess., 504 (1969). (J.L.A. 141).

He expanded upon this standard as follows:

> Except for free and reduced-rate mail, no postage rate would be set at a level below demonstrably related costs for the particular class or subclass involved. This provides a floor upon which a rate can be built to recover not only the demonstrably related costs but also an appropriate amount of the remaining costs, not traceable to any one service. The proposed legislation does not establish a rigid formula specifying how such allocation of nontraceable costs shall be made, although undue discrimination and preferences are expressly prohibited and all rates are required to be fair and reasonable. The determination as to how nontraceable costs shall be allocated can be made in the light of current economic conditions, and will depend upon the type, value, and quality of service rendered, and such market factors as the ability of users to pay and elasticity of demand.
>
> The Kappel Commission made an important contribution to the rationality of the ratemaking process when it pointed out the shortcomings of the present cost ascertainment system, under which all costs, direct and

---

classes of mail. There are some classes of mail that are more valuable than others. Some classes of mail cost more to handle than others. Some classes of mail are handled at the convenience of the Post Office Department where we can utilize the excess capacity that is in the Post Office Department and not otherwise being used. There are many of these things that end up as judgmental factors in allocating institutional costs as to the various classes. Hearings on H.R. 17070 before the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess., 47 (1970). (J.L.A. 113).

> indirect, are arbitrarily prorated among the several classes of mail without taking into account the differences in service and the differences in market conditions affecting the various classes.
>
> Only a costing system which shows what it actually costs to carry each class of mail can be helpful in determining the minimum price the various classes should pay. A supplemental accounting system needed to determine the costs demonstrably related to each class of mail is now being designed, and this system should provide reliable data from which a more rational rate structure can be developed. *Ibid* at 506. (J.L.A. 143).[13]

Even proponents of a differing approach to particular costing issues recognized that there were to be two rather than three types of postal costs. In a legislative proposal submitted by UPS, there was a clear recognition that there are only two types of postal costs, those which are demonstrably related and those which are not. *Ibid* at 692. (J.L.A. 178). Other witnesses on behalf of the private sector concerned about the ratemaking provisions demonstrated that they also recognized that postal costs were to be divided into two parts and that the

---

[13] During PMG Blount's coloquy with the Committee members, this theme is further developed. He explained that the then existing system simply prorated the institutional costs, approximately 50 percent of total costs, on a flat percentage basis, a system which lacks validity. He explained that the rate floor would consist of not only direct operating costs, but "any cost, whether institutional or otherwise, that is directly traceable to the class of mail in question." *Ibid* at 509. (J.L.A. 146). He also stated that he doubted that first-class mail was paying its own way at that time. Ibid at 512. (J.L.A. 149). He stated that elasticity of demand and financial impact upon users would have to be considered. *Ibid* at 516-518. (J.L.A. 152). A member of the Committee stated that PMG Blount's testimony "and this brief legislative history . . . [referring to Blount's appearance before the Committee] gives the assurances that we need in the ratemaking area. The checks and balances on ratemaking seem appropriate and appear to me to be good ones." *Ibid* at 518. (J.L.A. 152).

institutional cost burden of the Postal Service was to be allocated on the basis of discretionary factors.[14]

B. The Rate Provisions Adopted By The House And Senate.

In response to the legislative record the House adopted provisions providing for a minimum rate *i.e.*, those costs. "demonstrably related" to each class of mail. H.R. 17070, 91st Cong., 2d Sess., § 1201(c) (1970). (J.L.A. 220). Rates thus determined would have been subject to a Congressional veto.

The Senate took a different approach. Instead of establishing a rate floor, it enacted a provision requiring that a number of factors be considered in establishing rates including the amount of costs "properly assignable" to each class of mail. S. 3842, 91st Cong., 2d Sess., § 3704(g) (1970). (J.L.A. 262-264). Under the Senate approach Congress did not retain veto power over rates.[15]

C. The Senate And House Reports.

1. The House Committee Report.

Finally, we examine what the Congress said about what it was doing as expressed in the Committee Reports. The House

---

[14] Mr. Harold F. Hammond, testifying on behalf of the Transportation Association of America, stated:

> Under H.R. 11750 . . . , parcel post would only be *required* to recover its out-of-pocket or 'demonstrably related' costs. These costs are estimated to be between 50 and 65 percent of full costs. The remaining 'overhead' or 'institutional' costs would be recovered in part, of course. However, the decision as to how much of these indirect, yet very real, costs would be a part of the parcel post rate base would be subject to the arbitrary discretion of the Rate Commissioners. *Ibid*, at 733, (J.L.A. 185). (emphasis in original)

[15] The full texts of the pertinent portions of the House and Senate versions of the bill are found at J.L.A. 220-221 and 262-264.

Report emphasized that the purpose was to create an agency which could apply its expertise to the rate-making process.

> There was a time when many public utility rates were established by legislatures, but the expertise and continuing study needed to set them fairly resulted over time in the gradual delegation of ratemaking responsibilities to quasi-independent regulatory agencies. Congressional delegation of postal ratemaking is a compelling need. The establishment of fair rates is so closely bound up with economics, accounting and engineering technicalities that Members of Congress, lacking the time, training, and staff support for thorough analysis, can perform only a sort of adjudicatory function on rate issues. For technical guidance, there has been an inevitable tendency for Members of Congress to look to mailer and management representatives whose presentations are apt to be colored by their own interests. H.R. Rep. No. 1104, 91st Cong., 2d Sess., 18 (1970). *reprinted in* 1970 U.S. Code, Cong. Ad. News 4417. (J.L.A. 282).

There is no indication that the rate making agency was to be bound by some particular theory of costing other than the minimum rate required by § 1201(c). There is no suggestion of more than two categories of costs or any suggestion that any portion of institutional costs should be allocated on the basis of costing techniques.

2. The Senate Committee Report.

The Senate Committee Report also provides no basis for concluding that the PRC was to be subject to stringent rules with respect to determining the "costs" of each of the mail classes. The section of the Report specifically addressed to the PRC provides no basis for concluding that the costing discretion of the PRC was to be circumscribed in any way. Indeed, the emphasis of the Senate Report is upon fair judgments rather than any particular approach to costing.

> In recommending rate decisions, the Commission is required to act in accordance with the statutory policy that the *costs* of all postal operations *must be apportioned* to all users of the mail *on a fair and equitable basis*, and in a manner that will not impair the overall value of the service

to the people. The rate schedule must be designed, moreover, to make it possible for the Postal Service to provide prompt, reliable, and efficient service to patrons in all areas.

The Rate *Commission must take a number of other factors into account as well, including, first of all, the establishment of a fair and equitable schedule*; the value to both the sender and the recipient of the service actually provided each class of mail; operating costs and the amount of institutional costs properly assignable to each class of mail; the effect of rate increases on the general public, on business mail users, and on private enterprenuers engaged in the delivery of non-letter mail matter; the availability and cost of alternate means of sending and receiving mail matter; cost reductions realized by the postal service as a result of mail preparation performed by the mailer prior to deposit of the mail into the postal system; simplicity of structure for the entire schedule; and such other factors as the Commission may deem appropriate. S. Rep. No. 912, 91st Cong., 2d Sess., 15 (1970). (J.L.A. 308). (emphasis added).

The Senate explicitly declined to impose a specific approach to costing or rate making upon any type of mail.

Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and *no particular classification of mail is required to recover a designated portion of its costs beyond its incremental costs*. That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law. That *criteria* [sic] for ratemaking *include seven specific requirements*, among them, the effect of rate increases upon 'enterprises in the private sector of the economy engaged in the delivery of mail other than letters.' To go beyond that point would simply be to recommend provisions of law protecting a particular economic interest or limiting the availabil-

ity of a Federal parcel delivery service. *Ibid* at 17. (J.L.A. 310). (emphasis added).

Thus, there is nothing in the legislative proceeding before the Committees or in the Committee reports that supports the proposition that postal costs are to be divided into anything other than two categories or that the approach to costing advocated by the Kappel Report and the Postal Service had been rejected. Nor is there any hint that the PRC was required to go to extraordinary lengths to allocate costs on the basis of costing techniques rather than on the basis of non-cost factors—factors which were set out in considerable detail in the Senate version of the bill (and were ultimately adopted by Congress).

The valid conclusion from the legislative history is that Congress intended to relieve itself of the rate setting function by creating an independent regulatory agency that would be able to establish rates upon the basis of quasi-scientific criteria. Further, in so doing, the PRC was to be afforded the same deference normally afforded a rate-making agency in determining which costs should or should not be allocated to a particular class of service.

D. The Approach To Postal Ratemaking Ultimately Adopted Was An Amalgamation Of The House And Senate Versions.

1. Differences in the Senate and House Approaches

There were differences in approach between the Senate and House versions of the bill which needed to be resolved in conference. The rate-setting procedures under the House and Senate bills differed significantly. Generally, the House provisions provided more detailed and restrictive provisions concerning the determination of the "cost" of each mail class. The House bill contained a detailed statement of what constitutes

postal costs.[16] The House bill also provided for a rate floor for each class equal to its "demonstrably related costs." H.R. 17070, § 1201(c) *Ibid.* (J.L.A. 220). The House bill, however, had little to say about how the costs of the Service which are not "demonstrably related" to a class of mail were to be allocated, providing only that the "financial impact upon affected users" was to be taken into account. H.R. 17070, § 1201(d). *Ibid.* (J.L.A. 220, 221).

The Senate bill, on the other hand, contained only a sketchy definition of what constitutes postal costs. "Costs" were defined to include "operating costs, the amount of overhead, and other institutional costs." S. 3842, § 3702(g)(3) *Ibid.* (J.L.A. 263). Unlike the House bill, the Senate bill established no rate floor, providing only that the amount of costs "properly assignable" to each class of mail be one of numerous factors to be considered in setting rates. *Ibid.*

Going into the conference with respect to the costing language which is here in issue, the conferees were faced with a reconciliation between a statutory mandate establishing a rate floor for each type or class of mail, as found in the House version and the lack of a rate floor, and the inclusion of detailed pricing factors, as found in the Senate version.

The provisions of the Senate bill setting forth a number of factors to be considered by the Commission in establishing rates were accepted with the exception of what is now § 3622(b) (3), in which the House approach of establishing a rate floor for each type or class of mail was accepted, albeit with different wording.

---

[16] . . . costs shall include (without limitation) operating expenses, depreciation on capital facilities and equipment, debt service (including interest, amortization of debt discount and expense, and provision for sinking funds or other retirements of obligations to the extent that such provision exceeds applicable depreciation charges), and a reasonable provision for contingencies. H.R. 17070, 91st Cong, 2d Sess., § 1201(b) (1970). (J.L.A. 220).

Initially, it must be recognized that we simply do not know why the precise wording of § 3622(b)(3) was adopted. Certain inferences, however, are reasonable even without resort to legislative history. First, the Conferees decided to adopt the concept of a rate floor as provided in the House bill. Second, they decided to adopt the Senate's more detailed criteria to guide the PRC in the allocation of costs that could not be traced to the classes of mail through costing techniques. Third, presumably to avoid making any more drafting changes than necessary, they chose to use the Senate's "costing" factor as the vehicle for imposing a rate floor. Why they chose to replace the term "demonstrably related" with "attributable" is, however, entirely speculative. We do know that the term "attributable" has a meaning in common language whereas "demonstrably related" does not. That may have been the motivation for the change.

2. The Conference Report and Congressman Udall's Floor Statements are Entitled to Weight in Interpreting § 3622(b)(3).

The Conference Report endeavored to explain § 3622(b)(3). The Report interpreted the section as dividing costs into two categories and stated that non-attributable costs were to be assigned on a judgmental basis. H.R. Rep. No. 91-1363, 91st Cong., 2d Sess., 87 (1970). (J.L.A. 334). See p. 8 *infra*.

There is little other legislative history bearing directly upon the thinking of the Congress which led to the precise wording of § 3622(b)(3). In the Senate debate on the Conference Report, the attention of the members was directed, insofar as it was directed toward the rate-setting mechanism, to the fact that politics had been taken out of the Postal Service by the establishment of an independent PRC. 116 Cong. Rec. 26953-36955. (J.L.A. 357-359). Congressman Udall, a principal sponsor of the Act and one of the conferees, did explain § 3622(b)(3) on the floor of the House. Generally, his remarks paraphrased the language of the Conference Report. Additionally, however, he stated that while the phrase "demonstrably related costs" was deleted, "it was used throughout the conference to

express the feeling that each class of mail pay those direct or indirect costs attributable to it." 116 Cong. Rec. 27606. (J.L.A. 365).

Petitioners NAGCP and UPS maintain that neither the Conference Report nor Udall's remarks should be used as an indication of Congressional intent. NAGCP Brief at 26, 27, UPS Brief at 34, 35. Petitioners go too far in seeking to have these expressions of Congressional intent disregarded. Both the Second Circuit and the D.C. Circuit made use of the Conference Report in their decisions. Although petitioners attack the use of the Conference Report by the Second Circuit, they fail to acknowledge that the D.C. Circuit also made extensive use of the Conference Report. *See, NAGCP* I, at 586, 586 n.58, 587 and 589.[17]

---

[17] The cases cited by petitioners fail to support their contention that neither the Conference Report nor the statements made by Udall should be given significance. UPS Brief at 35, 36. NAGCP Brief at 26. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 10-12 (1968) concerned whether particular villages were to be included in the TVA's service area. In the face of differing approaches to the issue by various members of the Congress the Court found that the views of those who sought "the most restrictive reading" could not control the interpretation of a compromise version. The holding is inapplicable to the current situation because the House Conferees did not support a reading of § 3622(b)(3) more "restrictive" than the Senate Conferees. For the same reason, *Soucie* v. *David*, 448 F.2d 1067, 1077 n. 39 (D.C. Cir. 1971), *American Smelting & Refining Co.* v. *Occupational Safety & Health Review Commission*, 501 F. 2d 504, 509-511 (8th Cir. 1974), *Vaughn* v. *Rosen*, 523 F.2d 1136, 1142-43 (D.C. Cir. (1975) and *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 116-118 (1980) are inapplicable. Further, in the latter case, the Court was considering statements made by a member "after the section was enacted and the Commission's administrative interpretation [adopted]." At 116. In *Southern Pac. Transp. Co.*, v. *Usery*, 539 F.2d 386, 391 (5th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977), the Court found that "the legislative process—the process by which Congress arrived at the statutory language—is often a better guide than the interpretations of individual legislators or committee

In the absence of other legislative history, it would be wholly inappropriate not to give some weight to the Manager's Statement and the remarks of Congressman Udall. As stated by Chief Justice Marshall: "Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived." *United States* v. *Fisher*, 2 Cranch 358, 386 (1805). Quoted with approval *Consumer Product Safety Comm.* v. *GTC Sylvania*, 447 U.S. 102, 118 n.13 (1980). In the circumstances here present where changes were made in conference without any explanation by the Senate Conferees, but

---

reports . . . ." In that case, however, the provisions of one House had been accepted over another, which is not the situation with respect to § 3622(b)(3) which did not appear in either version of the hill.

In *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, 366-67 (1942), the Court found that a subpoena power was not delegable based in part upon the fact that authority to delegate had been eliminated by the Conference Committee. Again, this is not applicable to the interpretation of § 3622(b)(3) which was a modification by the Conference Committee based upon provisions found in both the Senate and House bills. In *Pennsylvania R.R.* v. *International Coal Co.*, 230 U.S. 184, 198-99 (1913) the Court was determining whether another section of an Act should be interpreted as meaning the same thing as an omitted clause. The Court found it "significant" that the provision had been omitted, but this is wholly inapposite to the legislative history of § 3622(b)(3). Indeed, the case *supports* the proposition that the Conference Report on H.R. 17070 is a valid tool for interpreting § 3622(b) (3). The Court states that reports and Committee members' expressions "may be looked at to explain doubtful expressions." *Ibid*, at 199.

In *D.C. Federation of Civic Associations, Inc.* v. *Volpe*, 434 F.2d 436, 444 n. 38 (D.C. Cir. 1970), the Court disregarded the House Manager's statement because remarks by Senators showed that it did not coincide with Senate intent. The case has no relevance. In *Davidson* v. *Gardner*, 370 F.2d 803, 828 (6th Cir. 1966), the Court found a House Report to be inapplicable to the fact situation. The general statements about reports therein are not of any assistance in this case.

some explanation by the House Conferees, such evidence of Congressional intent should not be disregarded. This is particularly true with respect to the question of whether § 3622(b)(3) provides for two or three tiers of costs, since the two-tier interpretation is entirely congruent with the history of the Act considered as a whole. As stated by Justice Frankfurter, "in construing legislation, regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952).

The statement concerning the proper interpretation of the section and more particularly the conclusion that the term attributable costs should be equated with demonstrably-related costs came from a principal sponsor of the Act, Congressman Udall. The Court has recognized that a sponsor's description of statutory words is of value. "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951). More importantly, the Conference Report merely confirms the legislative history rather than contradicting it. The Court has stated that a better understanding of the intent of a particular statute ". . . can be obtained from a consideration of the way in which Congress arrived at the statutory language than from trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports." *Corning Glass works* v. *Brennan*, 417 U.S. 188, 198 (1974).

Additionally, given the fact that no other interpretation of the phrase "attributable" is found, a phrase that appeared for the first time in the final version of the Act, petitioners offer no substitute for using the Conference Report and the comments of Congressman Udall to aid in determining whether the change was intended to provide for some wholly new approach to costing. Throughout the extensive legislative history there is *no* suggestion that postal costs are to be divided into anything other than two categories. Despite this, petitioners seek

to have the Court ignore the existing legislative history and find that by the adoption of the language found in § 3622(b)(3) Congress made a drastic change in the approach to costing adopted previously by both chambers.

3. UPS Misinterprets the Conference Report.

After discussing attributable costs the Conference Report states: "the conference substitute provides for a judgmental assignment of some part of the remaining costs." UPS construes this to mean that only "some" part of those costs remaining after the attribution process has been finished are to be assigned. Starting with this premise, UPS concludes that the Report intended this to refer to the non-cost factors of § 3622(b), since otherwise "there would be no provision in the Act governing the allocation of the other part of postal costs remaining after 'some' part of the unattributed costs were assigned." UPS Brief at 37.

UPS has misread the statement. Although not artfully worded, in the context of the statement, particularly in the context of the fact that it refers to "judgmental assignment" it is clear that the statement should be read as meaning that each class should bear "some part" of the total of the remaining or non attributable costs as assigned on a judgmental basis.

Further, this interpretation is supported by Congressman Udall's floor statements.[18] Regardless of the weight given to Congressman Udall's statement generally, it can hardly be

---

[18] In addition to this threshold requirement, the legislation provides for a judgmental assignment of some part of the remaining costs. The judgment as to what portion of institutional costs should be borne by each class is to be made in the light of the criteria in the bill. 116 Cong. Rec. 27606 (1970). (J.L.A. 365).

argued that his statement is not a valid interpretation of his own words.

E. UPS Fails In Its Efforts To Show That The Senate Favored A More Rigid Approach To Costing

The effort to discredit the value of the Conference Report and Congressman Udall's floor statements is based largely upon the false premise that the House and Senate were at odds with respect to the approach to rate making, with the Senate favoring a more expansive concept as to what costs should be borne by the classes of mail. UPS Brief at 25-33. NAGCP Brief at 25-27. The legislative history refutes this position. First, there is no evidence of any fundamental disagreement between the two chambers with respect to the costing process. Second, the concept of a rate floor, a minimum rate for all of the classes of mail, originated with the House, not the Senate. Third, the evolution of the Senate approach shows a change from a rigid to a more discretionary approach to costing.

The first Senate bill, S.3613, listed as one of the factors to be applied in setting rates the total costs of the Postal Service "properly attributable to each class of mail *in proportion to its share of mail volume.*" (emphasis added) S.3613, 91st. Cong., 2d Sess., § 3703(c)(2) (March 19, 1970). (J.L.A. 241). A later version of S. 3613 modified the factor to provide for consideration of the total amount of postal costs "properly attributable to each class of mail *based on and in proportion to its overall effect upon the postal system.*" (emphasis added) S.3613, 91st Cong., 2d Sess., § 3703(c)(3), Committee Print No. 4 (March 30, 1970). (J.L.A. 244-245). Ultimately, the Senate passed H.R. 17070 with an amendment which further modified the factor to provide for consideration of the total amount of postal costs "*properly assignable* to each class of mail or type of mail service." § 1203(g)(3). (emphasis added). *See* 116 Cong. Rec. 22315.

The most significant part of the Senate's approach to the standards for rate making is that the costing provision was simply one of many factors to be considered in the setting of rates. There was no requirement that any class of mail bear any

particular amount of total postal costs. Under the Senate approach the Rate Board would have had to *consider* the amount of costs properly assignable to each class of mail, but it could have set a rate recovering less than the amount "properly assignable" if its consideration of the other factors led to such a conclusion. Second, even in the phrasing of this one factor among many, the progression was from a rigid fully-allocated formula (the amount of costs attributable to each class "in proportion to its share of mail volume") to a general standard obviously leaving room for considerable discretion (the amount of costs "properly assignable" to each class of mail).

On brief, UPS fairly sets out the various versions of the costing factors found in the Senate bills. UPS Brief at 28, 29. Its commentary on those provisions is, however, wholly wrong. UPS first postulates, without support, that by the time of the Conference on the House and Senate versions of the Act, the "demonstrably related" costing language of the House bill had "become confused" with the Post Office's new costing system which was based on short-run variable costs. UPS Brief at 27. From this erroneous introduction UPS opines that the Senate was "unwilling to limit the costs that must be covered by each class of mail to the short-run variable costs of the class." *Ibid*, at 27, 28. The fact is that PMG Blount appeared before the Senate Committee to discuss the Service's new costing methodology subsequent to the appearance of Hargrove before the House Committee cited by UPS. Hearings on S.3613 before the Committee on Post Office and Civil Service, U.S. Senate, 91st Cong., 2d Sess., 1419, 1429-1430 (1970). (J.L.A. 212-213). If the Senate Committee had an intent to in any way circumscribe the approach to costing or, in particular, to impose or prohibit the use of a particular costing approach, it failed utterly to carry out that intent in the bill it reported, S.3842, a little over a month later. The Chairman of the Senate Committee did express the need to remove Congress from the rate-making process and contrasted the Senate provisions accomplishing that with the House bill supported by the Post Office under which Congress would have retained a veto power over rates. *Ibid*, at 1404.

Similarly, in the proceedings on the Senate floor considering the amendment to the bill substituting the Senate's approach to rate making for that contained in the House bill, there is no indication of any dispute over or concern about the approach to costing. Senator Javits explained the "essential element" as eliminating the Congressional veto. He contrasted this to the House bill in which in the "final analysis" the rates were "subject to veto by Congress." 116 Cong. Rec. 22317. Senator Baker, supporting the amendment stated that "it necessarily creates greater autonomy in the plan for postal reformation." *Ibid.* Similarly, upon the Senate's consideration of the Conference Report, there is no discussion about costing issues. The creation of an independent PRC is described as a "key" to the finances of the Service and one which will get Congress "out of the postal business." 116 Cong. Rec. 26958.

From this false hypotheses of a greater Senate concern over the measurement of costs, UPS proceeds to spin a web in support of its position which upon examination is seen to be illusory. Based upon the wording of § 3703(c)(2) of S.3613, which refers to "operating costs, overhead and other institutional costs," UPS avers that "from the beginning, the Senate associated the concept of attributable costs not only with operating costs, but also with fixed 'overhead, and other institutional costs.' " UPS Brief at 28. This conclusion is drawn from the language of the section which obviously does nothing more than set forth all of the kinds of postal costs. There is no "association" of the term "attributable" with any particular kind of cost. The term attributable was merely used to describe the amount of all postal costs to be associated with each class of mail in proportion to its share of mail volume.

After first imputing a meaning to the use of the word "attributable" which obviously does not exist, UPS goes even further afield. A subsequent Senate version of the Act significantly altered the costing factor by requiring only consideration of the amount of total postal costs attributable to each class of mail, based on and "in proportion to its overall effect upon the postal system," rather than the previous rigid requirement

that the amount attributable be in proportion to volume. From this UPS states that in the revision "the Senate went beyond the narrow concept of proportionate variability . . . ." UPS Brief at 28. This statement is truly remarkable. Neither version of the factor had anything to do with variability, proportionate or otherwise; there was only a progression from a rigid to a discretionary allocation of postal costs.

From this, UPS draws the conclusion that under the Senate bill each class was to recover *"all"* costs that are properly attributable to the class. UPS Brief at 29. (emphasis in original). This is patently false. The Senate bill contained no concept of a rate floor. Instead, the amount of postal costs properly "assignable" (and the Senate bill uses the term "assignable" not "attributable") was simply one of many factors to be considered in setting rates.

It is evident that the UPS premise, upon which it builds the argument that the costing language adopted by the Conference Committee was a resolution in which the Senate's allegedly more rigid costing provisions prevailed over those of the House, is false. UPS Brief at 30. The Senate's approach of a more detailed listing of pricing rather than costing factors prevailed as well as the independence of the PRC. As to creating a rate floor based on costing, however, it was the House approach that prevailed.

IV. THE COURT SHOULD DEFER TO THE PRC'S INTERPRETATION OF § 3622(b)(3).

In *Newsweek* the Second Circuit properly gave deference to the PRC's (and Postal Service's) interpretation that § 3622(b)(3) provides for two rather than three tiers of postal costs, citing, *inter alia*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).[19]

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given

[19] In *NAGCP I* the Court fails to apply the principles set forth in *Udall* v. *Tallman*. The only deference offered by the D.C. Circuit

> the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. *See* also, *e.g.*, *Gray* v. *Powell*, 314, U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583.

The Second Circuit was correct in concluding that the D.C. Circuit's decision was a "patent disregard" of the principle that courts should "refrain from unwarranted intrusions into areas entrusted to agency discretion and expertise." *Newsweek*, at 1197.

V. THE D.C. CIRCUIT'S INTERPRETATION OF § 3622(b)(3) IS FAULTY.

Although the D.C. Circuit in *NAGCP I* states that it interpreted § 3622(b)(3) on the basis of a "plain reading," an examination of its approach shows that it failed to do so. The Court made no attempt to give the terms of the section their ordinary meaning by carefully examining its structure. Instead, the Court proceeded immediately to a philosophical discussion of the section and an alleged Congressional concern about discrimination against first-class mail. The Court arrived at the conclusion that the statute provides for three rather than two tiers of costs only after first concluding that the "reasonably assignable" language provides for costing; not pricing.[20]

---

was to the CALJ. He is described as having a "special role." And, inexplicably, the Court finds that the CALJ may have given "great weight" to the low percentage of attribution under the "Commission's approach." The CALJ's initial decision was, of course, issued *prior* to the PRC's decision and he could have had no knowledge of the attribution that would be found by the Commission.

[20] In *Publishers*, the D.C. Circuit interpreted § 3622(b) as providing for two rather than three tiers of costs. "It [USPS] would be required to itemize its costs in more detail, determine which classes

Although legitimately noting that subsection (b)(3) is the only one of the 3522(b) factors set forth as a "requirement," the rest of the Court's "plain reading" lacks substance. The Court states that the subsection uses words "suggesting a substanial breadth to its coverage" citing the use of the words "each" and "direct" and "indirect" and "all other costs." *NAGCP I*, at 585. How the use of the word "each" aids in interpreting the section is unfathomable. The use of the term "direct and indirect" costs is clearly simply intended to encompass the sum total of all postal costs, and "all other costs" simply means the costs remaining after attribution is completed.

Finally, the Court concludes that the "emphasis throughout the subsection is unmistakably upon cost-of-service principles." In support of that proposition, the Court quotes those portions of the Act requiring that each class of mail bear the costs attributable and assignable to it and adds emphasis to the word "to" without explanation. *NAGCP I*, at 585. Next the Court states that the equal importance given to the attribution of indirect as well as direct postal costs means that Congress did not intend that variability would be acceptable as an exclusive method for identifying attributable costs. No one, however, had ever contended that attributable costs were to be limited to variable costs. The Court cites the Conference Report to support the undisputed proposition that attributable costs include costs which are the consequence of providing a type of service. (The Court, however, fails to acknowledge that the Conference Report contemplates two tiers of costs.) Final-

---

or service caused them and attribute those costs solely on that basis. Only very long-term costs and overhead could be 'reasonably assigned.' " *Association of Am. Pub., Inc.* v. *Governors of U.S. Post. Serv.*, 485 F.2d 768, 779 (D.C. Cir. 1973). As of then, the Court considered costs to be divided into two categories with attributable costs to include only "caused" costs and reasonably assignable costs to include only those costs which could not be based upon causation and therefore would have to be reasonably assigned on the basis of discretionary factors of the Act.

ly, the Court concludes that a "plain reading" of the Act suggests that once "extended" attribution is complete, the costs that are to be "reasonably assigned" must *also* be allocated on cost-of-service principles. *NAGCP I*, at 586.

The Court's approach to interpreting the section certainly is not a "plain reading."[21]

The Court's interpretation of the legislative history of the section is equally faulty. It first cites a 1913 case to support its conclusion that discrimination against first-class mail is a part of our postal system. Surely, a 60-year old case has no relevance to current conditions or what was intended by the Congress in the enactment of the Postal Reorganization Act.

The Court next concludes that it was an express aim of Congress to get politics out of the Postal Service. This is a correct statement but the Court draws the faulty conclusion that the Congress sought to achieve that goal by curtailing the PRC's discretion in setting rates. *NAGCP I*, at 588. Congress did want to get politics out of the Postal Service and it accomplished that, with respect to rate making, by creating an independent Postal Rate Commission and eliminating the roll of

---

[21] Compare the D.C. Circuit's approach to the PRC's straight forward "plain reading" of the section.

> This section specifies that the allocation should occur in two steps: first, with respect to those costs that are 'attributable to that class or type,' and second, in a reasonable assignment of all other costs.
>
> The word 'attributable' in this section implies that causal relationship has been established between the cost and mail class or service. It also implies that the cost is inherent in, or a characteristic of, the class or service. The section states that the relationship between the class or service and the attributable costs may be 'direct' or it may be 'indirect.' On the other hand, 'all other costs' may be assigned on bases that do not bear an inherent or causative relationship to costs. But there must be a rational basis for the assignment of those costs. Opinion & Recommended Decision, PRC Docket No. R74-1, 568-569 (1975).

Congress in setting rates. As concluded by the Court in *Newsweek:*

> The D.C. Circuit incorrectly equated Congress' clearly expressed intention to remove politics from the post office with removing discretion and judgment from the postal rate-making process. Congress, however, simply sought to eradicate discriminatory rate-making by creating an agency shielded from the forces of lobbyists and politics in general which in the past had caused discriminatory rate-setting while the rate-making process was conducted under the auspices of Congress. *Newsweek*, at 1198.

The Court then goes on to conclude that the Senate bill contained stricter cost requirements than did the House bill. In fact, as discussed at pages 30-33, *supra*, the House bill contained the more stringent requirements. The House version provided for a minimum rate level or "floor" whereas the Senate bill did not.

The D.C. Circuit's findings with respect to the proper interpretation of § 3622(b)(3) make no discernable distinction between the "costing" mandate flowing from the "attributable" language and the "costing" mandate flowing from "reasonably assignable" language. The Court finds that either or both parts of the section require the employment of cost-of-service principles to the fullest possible extent. *NAGCP I*, at 586, 592.[22] The D.C. Circuit's interpretation of the subsection

---

[22] The court does recognize the need to distinguish between attributable and reasonably assignable costs because of the provisions of § 3626(1) which preclude certain preferred classes of mail from bearing anything other than attributable costs. The explanation of the difference between the two types of costs is, however, exceedingly vague.

> While both attributable and assignable costs, as used in subsection 3622(b)(3), involve inferences of causation, the latter concept permits a greater degree of estimation and connotes somewhat more judgement and discretion than the former. . . . It is the freedom from having to bear either these more speculative

provides no real distinction between the types of costs encompassed by "attributable" and "reasonably assignable."

> While our analysis in that case *[Publishers]* emphasized the special role that cost-of-service principles must play in postal ratemaking, it did not clearly expose the extent to which these principles infuse not only 'attributable' costs but 'reasonably assignable' costs as well. *NAGCP I*, at 592, n.92.

In *NAGCP III* the D.C. Circuit itself recognized the difficulty of distinguishing between attributable and reasonably assignable costs on the basis of the *NAGCP I* decision. The Court recognized "that the PRC was struggling with the *NAGCP I* court's rather murky distinction between 'attribution' (for reasons other than volume variability) and 'assignment' both of which were to proceed from 'inferences of causation' ". *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392, 406 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

Effectively, therefore, the D.C. Circuit's interpretation reads out of the statute the reasonable assignment language by failing to give it any distinct meaning or purpose. If both phrases mean the same thing, the "reasonably assignable" language is entirely superfluous. This is directly contrary to the rule of statutory construction that every word and phrase of the statute should be given meaning.[21]

---

costs of service or any portion of the residuum costs that constitutes the 'preference' enjoyed by the classes of mail provided for in section 3626. *NAGCP I*, at 587 n.59. *See* also *NAGCP III*, at 401.

[21] It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed. *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883). *See* also *U.S.* v. *Menasche*, 348 U.S. 528, 538-39 (1955).

If the D.C. Circuit's approach were actually to be followed, it would be impossible to comply with § 3626(1). Section 3626 requires the PRC to distinguish between "attributable" costs and so-called "reasonably assignable" costs because the PRC may not lawfully allocate to the § 3626 classes anything other than "attributable" costs. The PRC cannot make vague findings about cost-of-service principles or extended inferences of causation and simply allocate costs on that basis without making a clear distinction between the two types of costs.

Finally, the D.C. Circuit emphasizes throughout its opinion that the section mandates the use of "cost-of-service principles" to the maximum possible extent. Notably lacking, however, is any definition of the term. The term "cost-of-service principles" is not a part of the economic literature and is not a term of art having any particular meaning within the context of rate making. Further, there is no mention of the term in the legislative history. In sum the D.C. Circuit has interpreted the Act by the use of a phrase which is not contained in the Act, is not contained in the legislative history and which the Court itself fails to define.

VI. THERE HAS BEEN NO CONGRESSIONAL ENDORSEMENT OF THE D.C. CIRCUIT'S INTERPRETATION OF § 3622(b)(3).

UPS argues that Congress has "endorsed" the D.C. Circuit's interpretation of § 3622(b)(3) as set forth in *NAGCP I*. UPS Brief at 38-39. The UPS argument is based upon the lack of Congressional action to implement the December 1976 recommendations to modify § 3622(b)(3) of the Commission on Postal Service established by the Postal Reorganization Act Amendments of 1976. From this UPS concludes that the Congress has endorsed the D.C. Circuit's interpretation of § 3622(b)(3).

The Court has found that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U.S. 304, 313 (1960). It is agreed that subsequent "legislation declaring the intent of an

earlier statute is entitled to great weight in statutory construction." *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 380-381 (1969). The mere failure of Congress to act upon proposals submitted to it, however, is of no significance in interpreting the intent of an earlier Congress.

Further, other action by the Congress subsequent to the enactment of the Postal Reorganization Act supports the conclusion that Congress disagreed with the expansive *NAGCP I* interpretation of the Act. During consideration of the Postal Reorganization Act Amendments of 1975,[24] an amendment that would have significantly expanded the concept of attributable costs was defeated. 121 Cong. Rec. 30777-84 (1975). (J.L.A. 367).

VII. THE PRC HAS APPROACHED THE TASK OF DETERMINING "ATTRIBUTABLE" COSTS REASONABLY AND IN ACCORDANCE WITH THE ACT.

Petitioner UPS makes much of what it considers to be the undesirable results which would flow from affirmation of the Second Circuit's decision. In essence UPS claims that such an affirmation would lead to a disregard of sound approaches to determining the "costs" of the various types and classes of mail and rate making would, instead, become subject, to an undue degree, to the assignment of costs on the basis of what it characterizes as "political" judgments. UPS Brief at 17.

Such fears are entirely unfounded. From the very first decision of the PRC, prior to any expression by the D.C. Circuit, and continuing in every decision thereafter, it has firmly rejected any narrow approach to costing. It has continuously sought to refine costing and to determine those costs which are actually caused by the various classes of mail and therefore act as a rate floor for those classes of mail. Although in Docket No. R71-1 (the first rate proceeding), the Postal Service had

---

[24] Pub. L. No. 94-421, 90 Stat. 1311.

argued that the PRC was bound to a particular method of costing, that approach was firmly rejected.[25]

Similarly, in its decision in Docket No. R74-1, the PRC again affirmed that it would not be bound to any rigid definition of what costs are caused by the classes. Opinion and Recommended Decision, Docket No. R74-1, 134 (1975). In that same Opinion, the Commission recognized that its particular approach in that case was not necessarily binding for all time. It characterized many of its findings with respect to costing methodologies as "tentative." "We do not regard the task of allocating all attributable costs as finished." *Ibid*, at 110. The Commission well stated that it would engage in the search for

---

[25] It is true, of course, that if Congress had prescribed a particular formula, the Commission would be duty-bound to follow it. But the Act says only that each mail category must bear the costs 'attributable' to it. No where does the Act define 'attributable' costs or explain how they are to be derived. If Congress shared the Service's costing theories, it certainly refrained from writing them into the statute. Opinion and Recommended Decision, Docket No. R71-1, 43 (1972) (footnotes omitted).

* * *

In refusing to dictate costing methodologies, Congress followed a practice whose wisdom is often proved in economic and legislative terms. Actually, when the Postal Service first undertook to develop a new costing system, it planned to consider both short-run and long-run costs. Ultimately, the Service decided against using a long-run method. It did so not because of any assumed legal proscription, but merely because another approach posed fewer practical difficulties. Indeed, Service witnesses recognize that a short-run approach may not be the most appropriate. The Service's own economic consultant took the view that long-run costing may be the right approach for future cases. Thus, even if the Service's own views are entitled to great weight, they show that the statute—far from requiring any particular method—actually envisions consideration of all appropriate costing approaches. *Ibid*, at 46 (footnotes omitted).

identifying costs which are caused by the classes of service, but would not attribute costs absent a valid basis for so doing.

> As our detailed criticisms will make clear, some of the parties have tended to assume that a cost believed to be attributable must be attributed on some ground—not necessarily a causal one—rather than left unattributed for want of data. We do not share this view. As indicated above, we believe that causation is both the statutory and the logical basis for attribution. Where an analysis based on causation cannot be made because data are lacking, we will do better to acknowledge that fact and press for a better data base than to construct an 'attribution' on a basis not contemplated by the statute. *Ibid*, at 110, 111

This approach has continued through the current docket. The Commission discussed how a "causal connection" should be established and found that the "common theme" in its decisions is that "cause" can be determined by "the analysis of *changes* in mail characteristics, either volume related or nonvolume related." Opinion and Recommended Decision, R80-1, 129 (1981). (emphasis in original). The PRC goes on to state:

> We want to make clear that we do not now require parties to utilize a form of variability analysis (whether it be volume variability or otherwise) in order to establish causal connections. Nor do we require any mathematical or statistical analysis. But we do require *some* sort of reasoned analysis of cost causation. (emphasis in original, footnote omitted) *Ibid*, at 130, 131.

In summary, the PRC has diligently sought to refine its ability to trace costs to the classes of mail causing those costs and there is no basis for concluding that it will now abandon that process because of the holding of the Second Circuit.

UPS also expresses the fear that the Postal Service would subvert the tracing of caused costs if it modified rates. UPS Brief, at 18. Although, by finding that the rates recommended by the PRC do not provide adequate revenues, the Governors of the Postal Service are authorized, by unanimous vote, to modify those rates, this is an exceptional circumstance. 39 U.S.C. § 3625. Given the holding of the Second Circuit that the

PRC has little, if any, authority to reduce the revenues requested by the Postal Service, modification of PRC recommended rates is unlikely to occur in the future since the PRC will be required to provide recommended rates sufficient to recover the Postal Service's stated revenue requirement. *Newsweek*, at 1205.

More importantly, the Second Circuit has made it clear that the Postal Service's authority to modify rates does not carry with it unbridled discretion to alter the costing determinations of the PRC. In *Time, Inc.* v. *USPS*, the Court's second consideration of PRC Docket R80-1, the Court made it clear that ratemaking authority is vested in the PRC. *Time, Inc.* v. *USPS*, Second Circuit, Doc. Nos. 81-4183, *et al*, Slip. Op., 3887 July 9, 1982. The Court also found that the "choice of costing methodologies is a matter entrusted to the expertise of the PRC." *Ibid*, at 3894. The Court found that the Governors could reject a PRC costing methodology only by finding that a PRC methodology will endanger the Service's balanced budget," but that it would have a "heavy" burden to "clearly demonstrate" that a particular PRC methodology would have that effect. *Ibid*, at 3895.

Further, the Postal Service would have the overall burden of showing that any rates adopted meet the standards of the Act which carries with it the requirement that all costs caused by a class of mail be recovered by the rate for that class of mail.

VIII. THE ALLOCATION OF NON-ATTRIBUTABLE COSTS ON "COST-OF-SERVICE PRINCIPLES" IS AS SUSCEPTIBLE TO ABUSE AS APPLICATION OF THE § 3622(b) FACTORS.

Implicit in the briefs of UPS and NAGCP is the position that the allocation of costs by accounting methodologies—pieces, weight or other measures—is inherently more rational and equitable than assignment of those costs on the basis of the criteria of § 3622(b). The position is entirely unwarranted as can be shown by a single example which the D.C. circuit impliedly praised in *NAGCP I*. The Court quotes with approval the conclusion by the CALJ in PRC Doc. No. R74-1 that

certain postal delivery costs could be appropriately allocated on the basis of "space and weight." *NAGCP I*, at 591. The PRC, however, had rejected that allocation because it produced anomalous results.

> [T]he relative average delivery cost per piece implicit in the Judge's allocation reflects an assumption that it will cost the Service 100 times more in labor costs to deliver the average parcel of 5.8 pounds than the average first-class letter. No evidence of record supports the implicit assumption that on the average it takes a carrier 100 times longer to deliver a parcel than a letter. Opinion and Recommended Decision, Docket R74-1, 108, 109 (1975). (footnotes omitted).[25]

In Docket R80-1, the PRC reviewed its past decisions with respect to the application of § 3622(b)(3). The PRC well stated the problem of using extended costing principles.

> The record in R74-1 clearly demonstrates that the allocation of costs on a cost-of-service basis is as susceptible to abuse as an allocation based on relative elasticities of demand. The use of unsupported judgments in choosing to allocate particular cost items and choosing distribution keys can support any rate schedule a particular participant might want the Commission to adopt. The need for an objective criterion of cost causality was clearly established. The Commission chose volume variability as its criterion of cost causality. It recognized that none of the proposals before it consistently applied that criterion. It increased the attribution of costs proposed by the Service, and identified specific cost items that appeared to be partially variable with volume. The Commission indicated that the level of attribution would continue to rise as further analysis of individual cost elements made possible the clear identification of the variable portion of costs within those elements. Opinion and Recommended Decision, R80-1, Appendix B, at 44 (1981).

---

[25] In the current docket, R80-1, the PRC expressed some regret it had been so mild in rejecting the CALJ's approach. The PRC now states: "The distribution key used by the law judge produced patently absurd results." Opinion and Recommended Decision, Docket R80-1, Appendix B, at 39 (1981).

IX. THE PRC's USE OF SERVICE-RELATED COSTS IS NOT A SIGNIFICANT ISSUE BEFORE THE COURT, AND IN ANY EVENT, THE PRC's USE OF THE METHODOLOGY IS PROPER.

Petitioner NAGCP raised the question of whether the PRC's use of service-related costs for the purpose of allocating a portion of postal costs is arbitrary and capricious. NAGCP's position appears to be not so much that the adoption of service-related costs is in itself arbitrary and capricious, but rather that it is arbitrary and capricious to use that costing approach while failing to adopt other costing approaches which NAGCP considers to be more "rational." NAGCP Brief at 32.

The use of service-related costs is not a significant issue before the Court. Both the D.C. and Second Circuits have affirmed the use of service-related costs and there is, therefore, no disagreement between the Circuits as to their propriety. Both Court's have found that this is a type of decision which is properly within the province of the PRC; it is not for the courts to determine the application of statutory criteria, but rather for the PRC. In *NAGCP I*, the Court stated:

> We wish to emphasize that our holding with regard both to attributable and assignable costs is narrow. Our duty in this case is not to prescribe any one methodology, and nothing we say here should be taken as approving in advance any particular approach. The selection of one approach from among acceptable alternatives is a matter for agency expertise." *NAGCP I*, at 592, 593.

In *NAGCP III*, the D.C. Circuit specifically affirmed the PRC's use of service-related costs. *NAGCP III*, at 412.

In any event, there is no basis for the position of NAGCP that the use of service-related costs is arbitrary and capricious. NAGCP seeks to establish its position on the basis of Postal Service witnesses in the proceeding before the PRC, the decision of the Governors, and the testimony of its own witness. NAGCP Brief at 33-36. NAGCP's only other argument against the use of service-related costs is confined to a recitation of the

effect of their use of costs on first-class mail and the mere affirmation that this result is discriminatory. NAGCP Brief at 36-37.

The fact that the Governors have simply opined that service-related costs should no longer be used despite the Service's earlier sponsorship of that concept should be given no weight by the Court. It is for the PRC, not the Governors, to determine the proper approach to costing.

The PRC gave full consideration to the testimony and arguments against service-related costs during the course of the proceeding, including, of course, the arguments and testimony advanced by NAGCP. The Commission rejected those arguments. Opinion and Recommended Decision, Docket No. R80-1, 145-154 (1981). As concluded by the PRC:

> We will continue to utilize the concept of service-related costs for the purpose of tracing cost causality in the delivery function. *Ibid*, at 151.

Further, in its Opinion and Recommended Decision upon Reconsideration, the PRC gave exhaustive consideration to the statements by the Governors, including the statements included in the NAGCP Brief. Opinion and Recommended Decision Upon Reconsideration, Docket No. R80-1, 67-115 (1981). In that opinion, the PRC demonstrates, *inter alia*, that the concept of service-related costs did not originate solely as a result of the decision of the D.C. Circuit in *NAGCP I*. Instead, the PRC's ultimate adoption of service-related costs was the end result of a progressive refinement of costing, including the need to recognize priority-related costs. *Ibid*, at 74-103. As there found by the PRC: "The few paragraphs of discussion in the Governors' Decision can hardly be said to provide a sound basis for the reversal of cost procedures that required five general rate cases to develop." *Ibid*, at 102.

As concluded by the PRC:

> The Commission found as a fact in R77-1 that preferential classes of mail cause service-related costs and that these costs must be assigned to the mail classes responsible for their incurrence. The Commission has found no basis on the record of R80-1 to reverse this finding of causality.

> Given this finding of causal responsibility, the Commission must distribute service-related costs to the preferential classes of mail. *Ibid*, at 113.

In summary, there is no division between the D.C. and Second Circuits with respect to the appropriateness of the PRC's use of service-related costs for the purpose of allocating a portion of postal costs. In any event, if the Court reaches the issue, NAGCP has advanced no valid basis for its conclusion that the PRC's judgment is arbitrary and capricious.[27]

X. THERE IS NO MERIT TO UPS'S ALLEGATIONS OF UNFAIR COMPETITION.

Petitioner UPS states in its brief that the Second Circuit's decision will permit unfair competition by the Postal Service against UPS and other private enterprise firms. The Second Circuit's decision correctly interpreted the Act. Thus, if UPS considers its situation to be threatened by the Act, its resort is to the legislative, not the judicial process.

There are, however, some allegations in the UPS Brief which need to be addressed. First, UPS implies that the rate increases for first-class mail during the period of 1970 through 1981 have been too large whereas the increases for parcel post mail have been too small. UPS Brief, at 46. Although the implied argument of UPS that this has been improper is incorrect, the fact remains that, ultimately, those rate increases resulted in large part from an approach to costing which was in accord with the dictates of the D.C. Circuit.

---

[27] DMMA argues persuasively that service-related costs are "caused" and thus "attributable" costs. DMMA Brief at 36-40. DMMA goes too far, however, in maintaining that service-related costs cannot be assigned pursuant to the other factors of § 3622(b). DMMA Brief at 40-46. Under § 3622(b) the PRC is broadly authorized to assign non-attributable costs in accordance with a number of factors including in addition to enumerated factors "such other factors as the Commission deems appropriate." 39 U.S.C. § 3622(b)(9).

Further, UPS ignores the fact that prior to the enactment of the Postal Reorganization Act, parcel post, alone among the types of mail, was required to meet its full costs. Former Title 39 USC § 4559. Parcel post enjoyed no benefit from the large Congressional appropriations which were in effect at that time. Because parcel post started from a higher base, its subsequent rate increases would necessarily be less. *See* Opinion and Recommended Decision, Docket No. R71-1, 197 (1972).

UPS also notes that there was no rate increase for "bound printed matter" in PRC Docket R80-1, here subject to review. UPS fails to point out, however, that, at the rates adopted, the cost coverage for bound printed matter (the ratio of revenues to cost expressed as a percentage) is 139 percent. The PRC acknowledged that this cost coverage was "high." Opinion and Recommended Decision, Docket No. R80-1, 553 (1981). In fact, except for those types of mail with an extremely high value-of-service (priority and express mail and mailgrams) the bound printed matter cost coverage exceeded that of every class of mail, including first-class mail. *Ibid*, App. G., Sch. 1. The setting of rates for bound printed matter at normal cost coverage levels would have resulted in a rate decrease.

In summary UPS fails to advance any solid support for its allegation that it is in danger of being subjected to unfair competition.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit in *Newsweek* should be affirmed.

Respectfully submitted.

TIMOTHY J. MAY
DAVID C. TODD
Attorneys for Respondents
Mail Order Association of America
Parcel Shippers Association, Inc.
The Reader's Digest Association, Inc.

PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Dated: September 7, 1982

Respondent's Brief

6

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF FOR INTERVENOR-RESPONDENTS MARCH OF DIMES BIRTH DEFECTS FOUNDATION AMERICAN LUNG ASSOCIATION NATIONAL EASTER SEAL SOCIETY ST. JUDE CHILDREN'S RESEARCH HOSPITAL AMERICAN CANCER SOCIETY NATIONAL WILDLIFE FEDERATION

WILLIAM J. OLSON, ESQ.*
JAMES E. GATES, ESQ.
SMILEY, OLSON & GILMAN
Suite 600
1815 H Street, N.W.
Washington, D.C. 20006
(202) 466-5100
**Counsel of Record*

ALAN R. SWENDIMAN, ESQ.
JACKSON, CAMPBELL & PARKINSON
Suite 300 South
1120 - 20th Street, N.W.
Washington, D.C. 20036
(202) 457-1600
Counsel for Intervenors

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether the Postal Reorganization Act *requires* the Postal Rate Commission to attribute costs to the maximum extent possible to each class of mail and type of service including those fixed costs which are incurred by the Postal Service as a whole and which do not change with changes in volume.

2. Whether the Postal Reorganization Act confers upon the Postal Rate Commission discretionary authority to select appropriate methodologies to allocate costs to each class and subclass of mail and type of service.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. THE POSTAL REORGANIZATION ACT REQUIRES THAT THE COMMISSION ATTRIBUTE ONLY THOSE COSTS WHICH THE COMMISSION HAS DETERMINED TO BE VOLUME VARIABLE AND THEREFORE CAUSALLY LINKED TO A PARTICULAR CLASS OR SUBCLASS OF MAIL	13
A. The Kappel Commission Report Upon Which The Act's Rate-Making Sections Were Founded Establishes Volume Variability As The Central Principle In Cost Allocation	14
B. The Legislative History Surrounding Final Passage Of The Act Confirms That Only Volume Variable Costs Are To Be Attributed	23
II. THE EXERCISE OF DISCRETION BY THE POSTAL RATE COMMISSION IS ENTITLED TO SUBSTANTIAL DEFERENCE BY THE COURT ON REVIEW	31
A. The Act And Judicial Decisions Support A Narrow Scope Of Review Due To The Discretion Granted To The Commission	31
1. The Act limits the scope of review on appeal	31
2. Fundamental principles of administrative law dictate that courts defer to the discretion and expertise of the Postal Rate Commission	35
B. The Commission Has Consistently Interpreted Its Enabling Act To Attribute Only Volume Variable Costs	38
C. The Commission's Use Of The Service-Related Cost Methodology Is Within The Discretion Accorded By The Act And Should Be Upheld	42
1. Rejection of the methodology is not supported by the record	42

Table of Contents Continued

Page

2. The lower courts agree that the methodology comports with the Act and is within the Commission's discretion 44

CONCLUSION 46

TABLE OF AUTHORITIES

CASES: Page

American Telephone and Telegraph Co. v. *United States*, 299 U.S. 232 (1936) 35

Ayrshire Collieries Corp. v. *United States*, 335 U.S. 573 (1949) 36

Association of American Publishers, Inc. v. *United States Postal Service*, 485 F.2d 768 (D.C. Cir. 1973) 2, 14, 23, 34

Board of Governors v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978) 38

Board of Trade v. *United States*, 314 U.S. 534 (1941) 35, 36

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) 35

Buchanan v. *United States Postal Service*, 508 F.2d 259 (5th Cir. 1975) 23

Caminetti v. *United States*, 242 U.S. 470 (1917) 27

Cass v. *United States*, 417 U.S. 72 (1974) 26

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 34, 35

Consolo v. *Federal Maritime Commission*, 383 U.S. 607 (1966) 34

D.C. Federation of Civic Associations, Inc. v. *Volpe*, 405 F.2d 558 (D.C. Cir. 1975) 29

EPA v. *National Crushed Stone Association*, 449 U.S. 64 (1980) 29

Maine v. *United States Postal Service*, 405 F.Supp. 551 (D. Me. 1975) 28

Mourning v. *Family Publications Service, Inc.*, 411 U.S. 356 (1973) 35

Table of Authorities Continued

Page

National Association of Greeting Card Publishers v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976) ..... 2, *passim*

National Association of Greeting Card Publishers v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979) ..... 2, *passim*

NLRB v. *Hendricks County Rural Electric Membership Corporation*, ___ U.S. ___, 102 S.Ct. 216 (1981) 29

Newsweek, Inc. v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981) ..... 2, *passim*

New York v. *United States*, 331 U.S. 284 (1947) 36

Norfolk and W.Ry. Co. v. *United States*, 287 U.S. 134 (1932) 35

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 30

Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) 27

Time, Inc. v. *United States Postal Service*, No. 81-4183 (2d Cir. July 9, 1982) ..... 9, *passim*

Train v. *Colorado Public Interest Research Group*, 426 U.S. 1 (1976) 14, 26

Udall v. *Tallman*, 380 U.S. 1 (1965) 38

United States v. *American Trucking Associations, Inc.* 310 U.S. 534 (1940) 26

United Parcel Service, Inc. v. *United States Postal Service*, 604 F.2d 1370 (3d Cir. 1979) 36

United States Postal Service v. *Council of Greenburgh Civic Associations*, ___ U.S. ___, 101 S.Ct. 2676 (1981) 23

Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) 31

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 706 .. 32, 33, 34

Postal Reorganization Act, 39 U.S.C. §§ 101 *et seq.* ..... 2, *passim*

39 U.S.C. § 201 3

39 U.S.C. § 202(a) 3

Table of Authorities Continued

Page

39 U.S.C. § 3601 ..... 3, 36
39 U.S.C. § 3622(a) ..... 3, *passim*
39 U.S.C. § 3622(b) ..... 3, *passim*
39 U.S.C. § 3624(a) 3, 37
39 U.S.C. § 3625 ..... 4, 37
39 U.S.C. § 3625(d) 4, 5, 37
39 U.S.C. § 3626 26
39 U.S.C. § 3628 ..... 5, 32, 34
39 U.S.C. § 4452(c) 26

LEGISLATIVE MATERIALS:

Bills:

H.R. 11750, 91st Cong., 1st Sess. (1969) 20, 29
H.R. 17070, 91st Cong., 2d Sess. (1970) 20, 23, 32
S. 3842, 91st Cong., 2d Sess. (1970) 32

Reports:

H.R. Rep. No. 91-1363, 91st Cong., 2d Sess. (1970) ..... 25, *passim*
H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. (1970) 22, 36
H.R. Rep. No. 93-1084, 93rd Cong., 2d Sess. (1974) .. 8
H.R. Rep. No. 95-808, 95th Cong., 1st Sess. (1977) ... 18
S. Rep. No. 91-202, 91st Cong., 1st Sess. (1969) 28
S. Rep. No. 91-912, 91st Cong., 2d Sess. (1970) 24, 36, 37

Debates:

114 Cong. Rec. 24028 (1968) 29
114 Cong. Rec. 24035 (1968) 29
116 Cong. Rec. 19845 (1970) 14
116 Cong. Rec. 20222 (1970) 23
116 Cong. Rec. 21708 (1970) 14, 23
116 Cong. Rec. 21716 (1970) 23

Table of Authorities Continued

Page

116 Cong. Rec. 26954 (1970) 24

116 Cong. Rec. 26958 (1970) 26

116 Cong. Rec. 27602 (1970) 26

116 Cong. Rec. 27605 (1970) 37

116 Cong. Rec. 27606 (1970) 30

Hearings:

Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. (1969) 15, 16, 21, 22

Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 2d Sess. (1970) 21

ADMINISTRATIVE DECISIONS:

Postal Rate Commission, Opinion and Recommended Decision, Docket No. R71-1 (June 5, 1972) 39

Postal Rate Commission, Opinion and Recommended Decision, Docket No. R74-1 (Aug. 28, 1975) 39

Postal Rate Commission, Opinion and Recommended Decision, Docket No. R76-1 (June 30, 1976) 40

Postal Rate Commission, Opinion and Recommended Decision, Docket No. R77-1 (May 12, 1978) ... 41, 42, 43

Postal Rate Commission, Opinion and Recommended Decision, Docket No. R80-1 (Feb. 19, 1981) 8

Postal Rate Commission, Opinion and Recommended Decision Upon Reconsideration, Docket No. R80-1 (June 4, 1981) 44

Postal Rate Commission, Opinion and Recommended Decision Upon Further Reconsideration, Docket No. R80-1 (Sept. 17, 1981) 43

Decision of the Governors of the United States Postal Service, Docket No. R71-1 (June 29, 1972) 39

Decision of the Governors of the United States Postal Service, Docket No. R74-1 (September 4, 1975) .. 40

Decision of the Governors of the United States Postal Service, Docket No. R76-1 (July 7, 1976) 40

Table of Authorities Continued

Page

Decision of the Governors of the United States Postal Service, Docket No. R77-1 (May 19, 1978) 41

Decision of the Governors of the United States Postal Service, Docket No. R80-1 (March 10, 1981) 2

MISCELLANEOUS:

Note, *Conference Committee Materials in Interpreting Statutes*, 4 *Stan. L. Rev.* 257 (1952) 27

Executive Order No. 11341, 32 Fed. Reg. 5765 (April 11, 1967) 15

A. Kahn, *The Economics of Regulation: Principles and Institutions* (1970) 17

B. Mezines, *Administrative Law* (1977) 38

Rules of the House of Representatives, 91st Cong., 2d Sess., Rule XXVIII (1970) 27

C. Sands, *Sutherland Statutory Construction* (1973) .. 30

Towards Postal Excellence: The Report of the President's Commission on Postal Organization, June 1980 ..... 3, *passim*

United States Postal Service, *Domestic Mail Manual* (1982) 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1304 and 81-1381

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF FOR INTERVENOR-RESPONDENTS
MARCH OF DIMES BIRTH DEFECTS FOUNDATION
AMERICAN LUNG ASSOCIATION
NATIONAL EASTER SEAL SOCIETY
ST. JUDE CHILDREN'S RESEARCH HOSPITAL
AMERICAN CANCER SOCIETY
NATIONAL WILDLIFE FEDERATION

STATEMENT OF THE CASE

This case comes before the Court on a grant of the petitions for *certiorari* filed by the National Association of Greeting Card Publishers (hereinafter "NAGCP") and the United Parcel Service (hereinafter "UPS") from a decision rendered by the United States Court of Appeals

for the Second Circuit,[1] which affirmed in part and remanded in part a Decision of the Governors of the United States Postal Service, dated March 10, 1981 (hereinafter "First Decision") (Pet. App., Appendix B). The Governors' Decision was based upon an Opinion and Recommended Decision of the Postal Rate Commission, dated February 19, 1981. At issue is the proper interpretation of the Commission's ratemaking authority under 39 U.S.C. § 3622(b), and the method employed by the Commission for allocating costs between mail classes in setting rates and fees. Because of the Second Circuit's opinion, a conflict exists with the United States Court of Appeals for the District of Columbia Circuit[2] which requires resolution by this Court.

Postal Reorganizational Act

This case arises under the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, 39 U.S.C. §§ 101, *et seq.* (hereinafter "Act") which was the outgrowth of a

---

[1] *Newsweek, Inc.* v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981), *cert. granted*, ___ U.S. ___, 50 U.S.L.W. 3838 (1982) (hereinafter "*Newsweek*"), reproduced as Appendix A to the Petition for Certiorari, No. 81-1304, filed by NAGCP. In addition to the Appendices to the Petition for Certiorari (hereinafter "Pet. App."), portions of the record are reproduced in the Joint Appendix (hereinafter "J.A.") and the Joint Appendix prepared for the Second Circuit (hereinafter "2d Cir. J.A."), which have been filed with this Court. In addition, the parties have submitted a Joint Appendix of Relevant Legislative Material (hereinafter "J.L.A.").

[2] *Association of American Publishers, Inc.*, v. *United States Postal Service*, 485 F.2d 768 (D.C. Cir. 1973); *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ("NAGCP I"); *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) ("NAGCP III").

report by a Presidential commission.[3] The Act established the United States Postal Service ("Postal Service" or "USPS") as an independent agency to be governed by an eleven-member Board of Governors ("Governors"). 39 U.S.C. §§ 201, 202(a). The Act also created the Postal Rate Commission ("Commission" or "PRC") as an "independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 3601. Congress delegated to these two agencies the authority to set postal rates and fees which the Congress itself had traditionally exercised.

Under the Act, the Postal Service initiates a rate proceeding by requesting the Commission to submit a recommended decision on changes in rates or fees if it determines that such changes are in the public interest. With its request, the Postal Service submits a schedule of proposed rates and fees. 39 U.S.C. § 3622(a). Upon receiving the request, the Commission must hold hearings on the record in which the Postal Service and interested users of the mail may participate and present evidence. 39 U.S.C. § 3624(a). The PRC then must submit a recommended decision to the Governors with proposed rates and fees for each class of mail or type of service in accordance with nine specific criteria as well as "the policies of [the Act]":

> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

---

[3] *Towards Postal Excellence:* The Report of the President's Commission on Postal Organization, June 1968 ("Kappel Report").

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.
[39 U.S.C. § 3622(b).]

Upon receipt of the opinion and recommended decision, the Governors have three limited options: (1) approve the recommended decision; (2) allow it under protest, and either seek judicial review thereof or return it to the Commission for reconsideration; or (3) reject the recommended decision and resubmit the request to the Commission. 39 U.S.C. § 3625. If the Governors reject the recommended decision, the Commission must reconsider the proposal and the record, and transmit a second opinion and recommended decision to the Governors. 39 U.S.C. § 3625(d). In reviewing the second opinion, the Governors under the Act have the additional option of

modifying the Commission's opinion if certain specified preconditions are met. 39 U.S.C. § 3625(d).[4]

Appellate review of the Governors' decision may be obtained in any Court of Appeals of the United States by an aggrieved party who appeared in the Commission's proceedings. The Court of Appeals may affirm the decision or order that the entire matter be returned for further reconsideration, but it may not modify the decision. 39 U.S.C. § 3628.

Prior Postal Rate Proceedings

The general rate proceeding involved in this case is the fifth such proceeding since the Act became effective in 1970. In the first three general rate cases,[5] the Commission and the Governors agreed as to the proper method of allocating postal costs. Section 3622(b) of the Act required a two-step process. The first step was to allocate those costs which were directly or indirectly attributable to a specific mail class or service. Attributable costs were those costs which varied with volume. Using this approach, approximately one-half of the postal system's costs were attributed within the meaning of Section 3622(b)(3). The second step was to treat the remaining costs as "institutional" and to allocate them to the various mail classes and services on the basis of the eight non-cost factors listed in Section 3622(b).

In *NAGCP I*, however, the D.C. Circuit held that subsection (b)(3) was the primary factor to be considered

---

[4] To exercise this modification power, the Governors must unanimously find that such modification is in accord with the record and policies of the Act, and that the rates recommended by the Commission are not adequate to provide sufficient total revenue to equal as nearly as practicable estimated costs.

[5] Docket Nos. R71-1, R74-1 and R76-1.

in setting rates and that a three-step process was required. First, the Commission had to attribute to each mail class and service those costs which could be determined either through volume variability *or any reasonable inference of causation*, to result from providing the class or service in question. Second, the Commission then had to "assign" a portion of remaining costs to each class or service to the extent it could be reasonably determined or estimated that such class or service might account for particular costs. Finally, any other costs were to be allocated judgmentally by the Commission in accordance with the other factors listed in Section 3622(b). *NAGCP I*, 569 F.2d at 589. Thus, the Court interpreted the Act to *require* that the Commission *go beyond* volume variability to allocate fixed costs based on unspecified cost-of-service principles. *NAGCP I*, 569 F.2d at 585-587.

In response to the D.C. Circuit's opinion, the Postal Service introduced, and the Commission accepted, in the fourth general rate proceeding (Docket No. R77-1) the concept of service-related costs in order to "assign" costs pursuant to the second step enunciated in *NAGCP I*. The concept was premised upon the assumption that without preferential classes of mail,[6] the Postal Service would only operate on a three-day-a-week schedule rather than its normal six-day-a-week schedule. The fixed costs of delivery representing the difference between the hypothetical schedule and the actual schedule were then "assigned" to the preferential classes of mail which caused them. On appeal, the D.C. Circuit in *NAGCP III* reaffirmed its prior interpretation of Section 3622(b)

---

[6] These classes receive the fastest, or preferential, service under Postal Service regulations. United States Postal Service, *Domestic Mail Manual* §§ 331-332, 432.1. The categories include all first-class mail and a portion of second-class mail (known as "red tag").

which *required* a three-step cost allocation approach attributing fixed costs based on cost-of-service principles. *NAGCP III*, 607 F.2d at 400. In addition, the Court upheld the Commission's use of service-related costs as a proper methodology for assigning costs pursuant to the second step in the "three tier" approach. *NAGCP III*, 607 F.2d at 404.

History Of The Proceeding Below

The rate-making proceeding giving rise to these consolidated cases, Docket No. R80-1, was commenced on April 21, 1980, when the Postal Service transmitted a request to the Commission for a recommended decision on changes in postal rates and fees. The request was accompanied by a schedule of rates and fees supported by the testimony of eleven witnesses and numerous documents. In its submission, the Postal Service abandoned the service-related cost methodology.

The Commission conducted extensive hearings in which approximately fifty-five parties participated. Some ninety-one witnesses appeared and a transcript of over twenty thousand pages was compiled during the evidentiary hearing before the Commission *en banc*. March of Dimes, *et al.*[7] intervened and actively participated in the proceedings before the Commission and in the Second Circuit. March of Dimes, *et al.*, consist of five national voluntary health groups and a broad-based conservation organization which are significant users of

[7] March of Dimes Birth Defects Foundation, American Lung Association, National Easter Seals Society, St. Jude Children's Research Hospital, American Cancer Society, and National Wildlife Federation (referred to in the Commission proceedings as "March of Dimes, *et al.*"). These organizations, together with approximately thirty other charitable groups represent the interests of nonprofit mailers through the Alliance of Third-Class Nonprofit Mailers.

third-class nonprofit mail[8] as well as other mail classes and services. In the aggregate, these organizations annually mail over four hundred million pieces of third-class nonprofit mail constituting a significant portion of total third-class nonprofit volume.[9]

On February 19, 1981, after a ten-month proceeding, the Commission issued its Opinion and Recommended Decision ("First Opinion"). In its First Opinion, the PRC adhered to the D.C. Circuit's "three tier" process of allocating costs (2d Cir. J.A., Vol. IV, at 110-111), and reaffirmed its use of the service-related costing methodology previously litigated in Docket No. R77-1 and approved in *NAGCP III* (2d Cir. J.A., Vol. IV, at 151).

The Governors on March 10, 1981, allowed the recommended rates to take effect under protest, and returned the First Opinion to the Commission for reconsideration and a further recommended decision. In their decision,

---

[8] The rates for third-class nonprofit mail are set lower than those for third-class bulk regular mail. Congress created third-class nonprofit mail and, in 1952, established a rate differential between the two mail categories. Congress historically has provided lower rates for certain organizations such as March of Dimes, *et al.*, "to encourage the free flow of ideas throughout the country and to promote charitable causes." H.R. Rep. No. 93-1084, 93rd Cong., 2d Sess. (1974), reprinted in [1974] *U.S. Code Cong. & Ad. News* 3406. This policy has been continued under the Postal Reorganization Act. The "revenue forgone" by the Postal Service due to charging lower rates to nonprofits is appropriated by the U.S. Congress. Those mailers receiving lower rates are considered "preferred classes" and are not to be confused with the term "preferential service." Preferred classes have lower service standards and receive slower service in return for lower rates. Classes receiving "preferential service" are discussed in footnote 6, *supra*. *See*, United States Postal Service, *Domestic Mail Manual* §§ 431, 630, 730.

[9] Most of this mail consists of fund-raising solicitations and educational mailings which are critical to the operation of these organizations.

the Governors also rejected service-related costs as an improper rate-making methodology. (Pet. App. at 12b-13b). No hearings were held by, nor were any written submissions made to, the Governors prior to its decision. Appeals were taken from the Governors' Decision.[10] The judgment of the Second Circuit was entered on November 2, 1981.

In its decision the Second Circuit held that both the rate-making procedure followed by the Commission in Docket No. R80-1 and the use of service-related costs therein *were permissible* under 39 U.S.C. § 3622(b). The Court's ruling explicitly rejected the holdings of the D.C.

---

[10] Appeals from the Governors' First Decision were filed in the Second Circuit and in the D.C. Circuit. The District of Columbia appeals were transferred to the Second Circuit pursuant to 28 U.S.C. § 2112(a). Subsequent to the appeals taken, the Commission on June 4, 1981 issued its Opinion and Recommended Decision upon Reconsideration (hereinafter "Second Opinion") reaffirming its earlier recommendation. On June 29, 1981 the Governors rejected the PRC's Second Opinion and returned it for yet further reconsideration. On September 17, 1981, the Commission once more reaffirmed its recommendations in its Opinion and Recommended Decision Upon Further Reconsideration (hereinafter "Third Opinion"). In response thereto, the Governors on September 29 modified the Commission's decision under Section 3625(d) and adopted most of the rates originally requested by the Postal Service. From the Governors' action, appeals were filed with the Second Circuit. Oral argument was heard on April 21, 1982 and the case was decided on July 9, 1982. *Time, Inc.* v. *United States Postal Service*, No. 81-4183 (2d Cir. July 9, 1982) ("*Time*"). In its opinion remanding for further consideration, the Second Circuit held, *inter alia*, that the Board of Governors had failed to meet its burden of justifying its rejection of the service-related costs concept. Slip. op. at 3896. The Court invited the Governors to seek a fourth recommended decision from the Commission in light of its opinions in *Newsweek* and *Time*, and retained jurisdiction over the proceedings. Slip. op. at 3897-3898.

Circuit in *NAGCP I* and *NAGCP III* which had interpreted Section § 3622(b) to *mandate* use of a "three tier" approach in setting rates. *Newsweek*, 663 F.2d at 1211. The Second Circuit found that, although the Commission could at its discretion recommend rates using a three tier methodology, the Act also allowed the Commission to use other methodologies in setting rates. *Id.* It unequivocally stated that Section 3622(b)(3) *did not require* the Commission to attribute and assign fixed costs, which neither vary with volume nor are caused by any specific class of mail, to the maximum extent possible using cost-of-service principles. *Id.* at 1200.

From the Second Circuit's decision, both UPS and the NAGCP petitioned for writ of certiorari from this Court. The Solicitor General, on behalf of the Postal Service, joined in the petitions citing, *inter alia*, the conflict between the Circuits in interpreting 39 U.S.C. § 3622(b). Certiorari was granted on April 19, 1982.

SUMMARY OF ARGUMENT

The Postal Reorganization Act delegated to the Commission the authority to set rates for each class and subclass of mail and special service offered by the Postal Service. Inherent in the responsibility to set rates is the authority to allocate to the various classes and subclasses of mail the costs upon which rates are based. Discretion was given to the Commission to decide upon the costing methodology to utilize within specified parameters.

The framework for the Postal Reorganization Act was provided by a Presidentially-chartered study by the Kappel Commission. This Commission recommended the establishment of a rate floor for each class and subclass of mail. To avoid cross-subsidization among classes, each class would be required to pay the costs which it caused the Postal Service to incur.

Two types of costs comprised the rate floor: volume variable costs, and specific fixed costs. Volume variable costs (called "demonstrably related" costs by the Kappel Commission) were costs which varied with changes in volume. In other words, increasing the number of pieces of mail in the class results in increases in the particular cost involved. One example would be the costs of mail processing in larger post offices. As additional volume of a particular class enters the system, additional personnel are needed and additional costs are incurred to prepare the mail for distribution and dispatch, establishing a clear causal relationship between volume and costs. (2d Cir. J.A. Vol. IV, App. J., at 27).

Specific fixed costs were those costs which, although not responsive to changes in volume, are incurred due to the existence of a single class of mail. Accordingly, there is a clear causal relationship between the class and the cost which justifies that the cost be borne by that class of mail.

The remaining costs of the Postal Service are incurred to maintain a nation-wide network for the receipt and delivery of mail. These costs are also paid by mailers but are not part of the rate floor.

The Postal Reorganization Act adopted the Kappel Commission's concept of a rate floor by which each class of

mail must pay its volume variable and specific fixed costs (termed "attributable costs" under 39 U.S.C. § 3622(b)(3)) together with such portion of the remaining costs of maintaining the Postal Service which the Commission may judgmentally assign to the class using the non-cost factors set out in the Act (39 U.S.C. § 3622(b)(1),(2),(4)-(9)).

The Postal Service and the Commission have consistently followed this costing methodology. Nevertheless, the D.C. Circuit in *NAGCP I* and *NAGCP III* expressed its disagreement with the Postal Service and the Commission as to the legislative history of the Act and scope of discretion delegated by the Congress to the Commission in determining costs and rates.

These same issues came before the Second Circuit in *Newsweek*, below, which adopted a different approach which is in harmony with the decisions of this Court acknowledging the degree of discretion placed in administrative agencies in matters of this type. The Court properly construed the Act to allow only for the attribution of volume variable and specific fixed costs. The Court limited its inquiry to the narrow scope of review under 39 U.S.C. § 3628 and 5 U.S.C. § 706. Additionally, the Court properly granted to the Commission substantial discretion to select a costing methodology in harmony with the principles set out in the Act, such as the utilization of service-related costs.

Petitioners seek to have this Court reject the consistent administrative determinations made during the past decade by both the Postal Service and the Commission, which were firmly rooted in the Act and approved by the Second Circuit. There being no showing that any statutory directive has been violated, nor that the standards of 5 U.S.C. § 706 have been met, the decision of the Second Circuit should be upheld.

ARGUMENT

I. THE POSTAL REORGANIZATION ACT REQUIRES THAT THE COMMISSION ATTRIBUTE ONLY THOSE COSTS WHICH THE COMMISSION HAS DETERMINED TO BE VOLUME VARIABLE AND THEREFORE CAUSALLY LINKED TO A PARTICULAR CLASS OR SUBCLASS OF MAIL.

The central issue which has dominated postal ratemaking for over a decade is the proper interpretation of the term "attributable costs" as used in 39 U.S.C. § 3622(b). Since the very first rate proceeding under the Act, the Commission and the Postal Service have consistently defined the term "attributable costs" to mean only those costs which can be causally linked to a particular class or subclass of mail by virtue of the fact that they vary with fluctuations in volume. Except for the changes which the Commission felt required to adopt as a result of NAGCP I, it has refused, with equal consistency, to attribute those fixed costs of the postal system which are not caused by any particular class of mail. Petitioners seek to have this Court overturn this administrative interpretation which was grounded in the Act and upheld by the Second Circuit. The Commission's interpretation is also soundly based on the Act's legislative history.[11] No statutory directive having been violated, the Commission's interpretation of the Act should be sustained.

---

[11] Petitioners contend that because the "plain language" of the statute is at variance with the Commission's determination to attribute only those costs which are volume variable, examination of the Act's legislative history is superfluous. Brief for NAGCP at 16-19; Brief for UPS at 21-24. NAGCP goes so far as to assert that to review the legislative history underlying this "unambiguous" Act may be error. Brief for NAGCP at 19. The D.C. Circuit, whose interpreta-

A. The Kappel Commission Report Upon Which The Act's Rate-Making Sections Were Founded Establishes Volume Variability As The Central Principle In Cost Allocation.

In order to put into perspective an inquiry into the meaning of the term 'attributable cost," one must realize that rate-making concerns did not totally dominate Congressional attention during consideration of the postal bills which became the Act. When the Senate began debate on S. 3842, the Senate postal bill, Senator Gale McGee (D-Wyoming) stated that in the judgment of the Senate Committee on Post Office and Civil Service, of which he was Chairman, there were four general problem areas with the postal system. These included the cabinet level nature of the Post Office, the lack of control by the Postmaster-General over revenues and expenditures, the inability to develop long range planning as a government agency, and frequent change of management. None of these concerns involved rate-making.[12]

In subsequent debate on postal reorganization, the Congress did not neglect cost and rate issues completely. The Congress established broad guidelines in the Act for rate setting, 39 U.S.C. § 3622(b), and delegated imple-

---

tion of the statute on this point NAGCP supports, disagrees with this contention that the Act is unambiguous. In *Association of American Publishers*, the Court stated that the statute was "susceptible of a variety of interpretations." 485 F.2d at 779 (cited in *Newsweek*, 663 F.2d at 1197). To fail to consider available aids to construe the meaning of words as used in a statute can be error. *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976).

[12] 116 Cong. Rec. 21708 (1970) (J.L.A. at 349). When the House of Representatives began debate on H.R. 17070, Chairman of the House Committee on Post Office and Civil Service Congressman Dulski's overview of the bill devoted only two sentences to ratemaking. 116 Cong. Rec. 19845 (1970).

mentation of the responsibility for rate setting to the Postal Rate Commission.[13] 39 U.S.C. § 3622. The approach which Congress adopted for rate-making had its origin in a comprehensive postal study by a Presidentially chartered commission undertaken well before the first postal reorganization bill was drafted. An inquiry into the cost and rate issues raised by this appeal must begin with this early legislative history.

The President's Commission on Postal Organization was created by President Lyndon Johnson in 1967.[14] The Kappel Commission (so named after its Chairman) was broadly charged to "study the organization and structure of the postal service of the United States," to consider a wide range of issues including "methods of setting postal rates," and to report back in one year. During its term, the Kappel Commission conducted what it called " 'the most searching and exhaustive review ever undertaken . . .' of the American postal service."[15] Upon completion of its study, the Commission recommended abolition of the Post Office Department and transfer of its responsibilities to a new United States Postal Service.[16] The Report identified the problems in the Post Office which the Congress later sought to remedy in the Act, and the in-

---

[13] *See*, discussion *infra* at II.A.

[14] Executive Order No. 11341, 32 Fed. Reg. 5765 (April 11, 1967).

[15] Kappel Report at iii.

[16] Postmaster General Winton M. Blount explained that the Kappel Commission provided the analytic framework for postal reform endorsed by President Johnson, and subsequently served as the basis for the recommendations supported by President Nixon and embodied in H.R. 11750, the Administration supported bill. Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. 231-232 (1969) (J.L.A. at 132-133).

tellectual framework upon which reform was to be fashioned.[17] Over fourteen years later, the Kappel Report retains its vitality and utility in articulating a reasoned analysis of numerous postal issues.

The Kappel Commission addressed the issue of ratemaking by first examining the Cost Ascertainment System then employed by the Post Office Department.

> The Post Office uses a Cost Ascertainment System, authorized by a 43-year-old statute for determining the revenues, volume and cost of each class of mail. For determining costs it uses the "fully-allocated" method through which every postal expense is charged to some class of mail or special service. *A large segment of postal costs, however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary, but uninformative.* [Kappel Report at 30 (emphasis added) (J.L.A. at 004).][18]

This assessment was not only criticism of an outmoded costing system, but also commentary on the causal relationship between costs and output within the Post Office.[19] As with other large utilities, the Postal Service

---

[17] The Kappel Commission commissioned studies by several outside consultants. One study on rate issues was conducted by Foster Associates, Inc. The views contained in the consultant's report were expressly stated to be those of Foster Associates, Inc. only, and not necessarily those of the Kappel Commission. (J.L.A. at 011, 042).

[18] Cited in *Newsweek*, 663 F.2d at 1201 n.10. Reprinted in the Senate Hearings. Postal Modernization: Hearings Before the Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. 631 (1969).

[19] *See*, Rebuttal Testimony of John Haldi before the Commission discussing the "cost function" of the Postal Service (J.A. at 147a-149a) (cited by the Commission at 2d Cir. J.A. Vol. IV, at 122 n.1).

must maintain large fixed overhead expense. A large percentage of its total costs are incurred not because of the existence of any particular class of mail, but simply in order to provide a nationwide network for the receipt and delivery of mail.[20] The Kappel Commission did not set a standard as to what level of postal costs ought to be attributed to various mail classes. On the basis of its comprehensive examination of postal costs, it did conclude, however, that between 50 and 60 percent of these costs would be attributable to individual classes of mail.[21]

---

[20] NAGCP cites a treatise by Alfred Kahn in support of its position that joint fixed costs should be attributed. NAGCP implies that Kahn endorses (1) the use of cost accounting formulae to fully allocate fixed, common or joint costs among the classes of mail, and (2) the use of such fully distributed costs as the basis for determining postal rates. NAGCP Brief at 29. To the contrary, Kahn goes to great lengths to explain the defects of setting rates on the basis of fully distributed costs. *See*, A. Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. I, at 150-155 (1970).

[21] NAGCP and UPS strongly criticize the Commission for "only" attributing 49 percent of total costs in Docket No. R71-1 and 52.5 percent in Docket No. R74-1, leaving the remaining costs to be allocated among the classes as institutional costs. Brief of NAGCP at 5, 9, 18; Brief of UPS at 17. This criticism implies that the Commission has fallen short of some absolute standard of attributing costs. Nowhere do Petitioners identify what percentage of costs they believe to be attributable. Before the Commission, NAGCP argued that institutional costs should be held to between 10 and 20 percent to comply with the maximum attributions required by the "cost-of-service" principles of the Act. Brief of NAGCP before the Commission at 48. UPS favorably cited the attribution in another industry of 85-90 percent of total costs on a cost-of-service basis. Reply Brief of UPS before the Commission at 27. Attribution of 90 percent of postal costs is virtually indistinguishable from a fully allocated cost system. Accordingly, Petitioners seek to have the Court impose a result *contra* to the Kappel Report, upon which Congress relied heavily. Both the Kappel Commission and the Congress rejected a fully-allocated cost system, finding rather that approximately one-half of postal costs are institutional.

In commenting on a related issue, the Kappel Commission set out its understanding of the size of the pool of institutional costs.

> If the [Post Office] is to cover all its costs from its revenues, however, some classes must pay rates high enough to cover the *large pool of institutional costs which we estimate represent between 40% and 50% of total postal costs.* [Kappel Report at 131 (emphasis added) (J.L.A. at 019).][22]

Furthermore, the Commission believed that allocation of non-volume variable costs "by an accounting formula [was] inherently arbitrary."[23] Kappel Report at 131

---

[22] The House Post Office and Civil Service Committee more recently has explained that the Congress in 1970 intended for the Commission to attribute only volume variable costs which again were estimated to be approximately 50 percent of total postal costs.

> At the time of the enactment of the Postal Reorganization Act in 1970, it was generally believed (and there was ample testimony before the House and Senate Committees on Post Office and Civil Service to support the contention) that about half of the costs of the postal system varied according to mail volume and about half did not. The costing concept which the Post Office Department proposed, and which Congress approved, required that each class of mail pay rates to cover the costs which were 'attributable'—meaning directly related or caused by mail volume and also pay some contribution to the institutional costs—the other half—of the Postal System. The term 'attributable' and 'reasonably assignable' distinguish between these two kinds of costs. 'Reasonably assignable' was to involve distributing the costs which do *not* vary according the mail volume in accordance with the non-cost rate making principles. [H.R. Rep. 95-808, 95th Cong., 1st Sess. 8 (1977) (J.L.A. at 412).]

[23] NAGCP and UPS implicitly reject these findings of the Kappel Report and allege that the attribution of non-volume variable costs would eliminate rate distortion (NAGCP Brief at 31), and eliminate cross-subsidization. UPS Brief at 17; DMMA Brief at 35. To the contrary, the Kappel Commission believed that attributing only volume variable costs would eliminate cross-subsidization. Kappel Report at 61, 131 (J.L.A. at 006, 019).

(J.L.A. at 019). It explained that, "[s]ince no particular class of mail causes such costs, there is no reason from an accounting viewpoint why any particular class should be charged with them. . . ." Kappel Report at 131 (J.L.A. at 019).

The compulsion to allocate virtually every dollar of postal costs was the fundamental weakness in the Cost Ascertainment System. For this reason, the Kappel Commission rejected its continued use as well as that of any similar fully allocated cost system. Such a costing system ignored relevant concerns.

> In rigidly apportioning all postal costs—including the large pool of institutional costs not determined by mail volume—to each class of mail, the Cost Ascertainment System consciously ignores such "intangible" factors as priority of service, value of the service to the user and privacy accorded. [Kappel Report at 31 (J.L.A. at 005).]

The Kappel Commission defined institutional costs as those costs which did not vary with volume. It observed, for example, that "[m]uch of the cost of city delivery is an institutional cost. . . . It does not vary greatly with fluctuations in volume, but rather on the basis of such factors as growth and density of population." *Id.* at 131 (J.L.A. at 019). These institutional costs were not incurred by any single mail class; they were considered joint fixed costs.[24] They were ". . . attributable to the Post Office *as a system*." Kappel Report at 131 (emphasis original) (J.L.A. at 019.) "Not only were variable costs to be assigned, [t]he Post Office must . . . [then] assign to each [class] an appropriate share of the institutional costs." *Id.* at 133 (J.L.A. at 021). Thus, the recovery of

---

[24] The terms "fixed" and "institutional" were used synonymously by the Kappel Commission.

long-run variable costs would place ". . . a floor under the price for a given class of mail. . . ." *Id.* at 131 (J.L.A. at 019). To accomplish this task, the Commission concluded that further variability analysis was required and described the costing system needed by the new Postal Service.

> In order to implement such a policy the Post Office needs a more sophisticated cost accounting system than Cost Ascertainment. Indeed, it needs such a system not only for pricing but also for basic management purposes. This system should accumulate postal costs by post office and by function; *it should show how costs vary with increases in volume and what costs are essentially fixed or institutional.* [*Id.* at 62 (emphasis added) (J.L.A. at 007).]

The Kappel Commission anticipated the need for experts to decide how variable costs should be distributed.

> Once the variable costs of each function are determined, they should be assigned to the classes of mail in proportion to the responsibility of each for such costs. Assignment of many variable costs is, of course, a highly technical process. [*Id.* at 133 (J.L.A. at 021).]

The Kappel Commission's rejection of the Cost Ascertainment System, its estimation that approximately one-half of all postal costs were fixed (institutional), and its exclusive reliance on volume variability to determine causally related costs were incorporated by the Congress into the Act. The original Administration-supported bill, H.R. 11750, introduced by Rep. Udall on May 28, used the language of the Kappel Report to provide that each class of mail pay those costs "demonstrably related" to the class.[25] This language was also used in the amended House bill, H.R. 17070.[26]

---

[25] H.R. 11750, 91st Cong., 1st Sess. § 1201(c) (1969) (J.L.A. at 216).

[26] H.R. 17070, 91st Cong., 2d Sess. § 1201(c) (1970) (J.L.A. at 220).

In hearings before the Senate Committee on Post Office and Civil Service, Postmaster-General Winton M. Blount indicated the important role the Kappel Commission played in the legislation.

> The Kappel Commission made an important contribution to the rationality of the ratemaking process when it pointed out the shortcomings of the present cost ascertainment system, under which all costs, direct and indirect, are arbitrarily prorated among the several classes of mail without taking into account the differences in service and the differences in market conditions affecting the various classes.
>
> Only a costing system which shows what it actually costs to carry each class of mail can be helpful in determining the minimum price the various classes should pay.[27]

He then explained to the Committee the revenue and cost analysis being undertaken by the Post Office Department to supersede the Cost Ascertainment System. In his testimony, the Postmaster-General limited the term "demonstrably related costs," which were to be attributed, to volume variable costs.

> This analysis of revenues and costs . . . presents costs as what we call *demonstrably related costs.* You could substitute for that "direct costs with some variation," if you will, but it purports to indicate the kind of *costs that fluctuate with volume attributable to the various classes.* [Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 2d Sess. 1419 (1970) (emphasis added) (J.L.A. at 211).]

---

[27] Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. 506 (1969) (J.L.A. at 143).

Later, Mr. Blount quantified the percentage of non-variable postal costs at the same level as had the Kappel Commission.

> Mr. Chairman, the demonstrably related costs are only approximately *one-half of our total costs*. . . .
>
> . . . [Demonstrably related costs are] the costs that in effect *fluctuate with volume*, not the institutional costs or the fixed costs that would not fluctuate whether you had volume or not. . . .
>
> . . . the demonstrably related costs are only about *half of the total costs* of operating the Department. . . .
>
> . . . I stated that the demonstrably related costs are *one-half of the total costs* of the Department. *The other half are institutional costs that do not vary with volume.* [*Id.* at 1429-30 (emphasis added) (J.L.A. at 212-213).][28]

In essence, the Administration endorsed the Kappel Commission's rejection of the Cost Ascertainment System and any fully allocated cost system. This was conclusively shown in an exchange between Senator Yarborough and Mr. Blount as to whether the Cost Ascertainment System could be used in rate-making.

> Senator Yarborough: . . . Are you presently satisfied with the system by the Post Office Department, to the extent that the cost of services can be accurately determined?
>
> Mr. Blount: No, sir.[29]

---

[28] *See*, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 16-17 (1970) (J.L.A. at 280-281).

[29] Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 2d Sess. 287 (1969).

The importance of the Kappel Report is demonstrated[30] by repeated references to it during Congressional debate on the Act.[31] The Report contained a comprehensive and scholarly analysis of costing issues that was heavily relied upon by Congress. It therefore constitutes a critical source of Congressional intent, showing a Congressional desire to limit attributable costs to those costs which vary with volume.[32] The Second Circuit found this legislative history persuasive and upheld the Commission's definition of the term "attributable" costs. *Newsweek*, 663 F.2d at 1199 n.8, 1200-1201 n.10.

B. The Legislative History Surrounding Final Passage Of The Act Confirms That Only Volume Variable Costs Are To Be Attributed.

The bill which passed the House contained a requirement that rates must cover "demonstrably related" costs, using the term originated in the Kappel Report. H.R. 17070, 91st Cong., 2d Sess. § 1201(c) (1970); 116 Cong. Rec. 20222 (1970) (J.L.A. at 342). The bill passed by the Senate did not contain a similar rate floor, but set out a number of factors to be considered in setting rates. The

---

[30] Senator McGee described its importance in his initial statement during Senate consideration of postal reform in the 91st Congress, and a summary of the Report was reprinted. *See*, 116 Cong. Rec. 21708, 21716.

[31] *See generally, United States Postal Service* v. *Council of Greenburgh Civic Associations*, ___ U.S. ___, 101 S.Ct. 2676 (1981), and *Buchanan* v. *United States Postal Service*, 508 F.2d 259 (5th Cir. 1975).

[32] Yet, in none of the three major postal cases before the D.C. Circuit has the Kappel Report been mentioned. *Association of American Publishers*, 485 F.2d 768; *NAGCP I*, 569 F.2d 570; *NAGCP III*, 607 F.2d 392. It was, however, discussed below in *Newsweek*, 663 F.2d at 1199 n.8, 1200-01 n.10.

Committee Report, however, clearly indicated that the Senate Committee had followed the recommendations of the Kappel Commission by rejecting a fully allocated cost system and stated that ". . . no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost beyond its incremental cost." S. Rep. No. 91-912, 91st Cong., 2d Sess. 17 (1970) (J.L.A. at 310).

The Conference Committee deliberated for over three weeks. 116 Cong. Rec. 26954 (1970). The Conference Report contained the revised text of the Act, and as required by the House Rules, a Statement of the House Managers.[33]

The Statement of the House Managers explained the Conference Committee's selection of the language now contained in 39 U.S.C. 3622(b).[34]

---

[33] Inasmuch as its position is diametrically opposed to the Congressional intent manifested here, NAGCP and UPS would have the Court ignore the Conference Report.

Intervenor Direct Mail Marketing Association ("DMMA") asserts that the Statement of the House Managers is aberrational as it has no antecedent in the legislative history. It further contends that nowhere in the legislative history prior to the House Managers' Statement was the thought ever expressed that the statutory rate floor should be limited to short-run or any other type of volume variable costs. DMMA Brief at 28.

To the contrary, the legislative history of the Act, as demonstrated above, is replete with authority that no other type of costs except volume variable costs should be included in the cost-based rate floor. From the Kappel Report through the testimony of the Postmaster-General, the House and Senate bills, reports, and floor consideration, this is the unmistakable and dominant costing methodology upon which Congressional debate centered. (*See*, Section I.A., *supra*.)

[34] The rate section of Section 3622(b), as agreed to by the Conference Committee,

> The provision in the conference substitute with respect to costs attributable to a class of mail or type or service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that *vary over the short term in response to changes in volume* of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs. [Conference Report No. 91-1363, 91st Cong., 2d Sess. 87 (1970) (emphasis added) (J.L.A. at 334).][35]

The Congress' intent as to cost allocation was further manifested in the discussion on nonprofit rates. The Conference Report pointed out that rates for nonprofit mailers would not include ". . . any portion of overhead or institutional costs."[36] Prior to adoption of the Postal

---

> . . . represents a combination of (1) the common *primary* factor between the House and Senate bills that rates be established on a fair and equitable basis, (2) the non-cost factors provided in the Senate bill and (3) the rate floor provided by the House bill. [*Newsweek*, 663 F.2d at 1200 (emphasis original).]

[35] The attribution of "specific fixed" costs as well as volume variable costs was grounded in the Kappel Report. Kappel Report at 131 (J.L.A. at 019). Even though these costs were fixed, a causal link to a particular class of mail could be clearly established and therefore the Conference Committee provided that they should be attributed. An example of a specific fixed cost is the cost of parcel sorters which is incurred exclusively to handle parcel post mail. These costs are clearly different from joint fixed costs which are part of the institutional overhead of the Postal Service and which cannot be causally linked to any specific class or subclass of mail.

[36] *Id.* at 86 (J.L.A. at 333). The Congress established reduced rates for "preferred" or "reduced rate" mailers by statute. *See*, footnote 8, *supra*. In an effort to remove the Congress from the rate setting process, a formula was devised to provide a continuing subsidy to these preferred mailers, primarily nonprofit organizations. Reduced

Reoganization Act, rates for third-class nonprofit mailers had been established at approximately one-half of the third-class commercial rate.[37] There is no indication in the Conference Report or any other legislative history that the Congress anticipated that the then existing level of subsidy for preferred mailers would significantly change as a result of § 3622(b).[38] Accordingly, attributable costs which are the only type of costs paid by nonprofits were anticipated to be about 50 percent of total costs.

The judicial use of extrinsic aids such as legislative history in statutory construction is well established. "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination." *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 543-544, (1940); *Cass* v. *United States*, 417 U.S. 72, 77-79 (1974); *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 8-10 (1976). Conference committee material is an appropriate tool in ascertaining Congressional intent. Since such reports are required, there is a presumption that the measure the committee recommends has the purpose it declares and will be

---

rate mailers would be charged their attributable costs, but no institutional overhead costs. 39 U.S.C. § 3626. *NAGCP I*, 569 F.2d at 587 n.59. The Congress was to appropriate the amount not paid by preferential mailers to the Postal Service in the form of "revenue-forgone" subsidy.

[37] The pound rate for third-class nonprofit mail was set by former statute to equal 50 percent of the third-class commercial rate. 39 U.S.C. § 4452(c) (repealed 1970).

[38] There was discussion on the House and Senate Floor and in the Conference Report of the Act's impact on nonprofit mailers. *See, e.g.*, 116 Cong. Rec. 27602 (1970) (remarks of Rep. Derwinski); 116 Cong. Rec. 26958 (1970) (remarks of Sen. Boggs).

accomplished as declared. *Caminetti* v. *United States*, 242 U.S. 470, 499 (1917) (dissenting opinion of Justice McKenna). Because the report only includes the law itself, the rules required the House Conference members to submit an explanation of the changes made in conference.[39] "These statements are often elaborate and carefully worded explanations of the nature of the compromise." Note, *Conference Committee Materials in Interpreting Statutes*, 4 *Stan. L.Rev.* 257, 258 (1952).

The Statement of the House Managers was an integral part of the Conference Report on the Postal Reorganization Act as presented to the House of Representatives before it voted on August 6.[40] It was signed by all House Conferees who also agreed to the text of the bill. The House Conferees receded to the Senate position on ratemaking. Since it was the House which receded, the explanation of the House Conferees in urging deletion of the House's language becomes critical. A record of deliberations before the Conference Committee does not exist, and there is no report of the Senate managers. As such, then, the Statement of the House Managers pro-

---

[39] Rule XXVIII of the Rules of the House states:

> . . . [T]here shall accompany every such report a detailed statement sufficiently explicit to inform the House what effect such amendments or propositions will have upon the measures to which they relate. [*Rules of the House of Representatives*, Rule XXVIII, 91st Cong., 2d Sess. (1970).]

[40] NAGCP contends that since the Managers' Statement was published after Senate passage of the Act it is of no weight. NAGCP Brief at 27. The case cited by Petitioner, however, implies that only if there are two conflicting sources of legislative intent, a Senate report considered by both houses and a House report considered by one, will the Court find that the Senate Committee's version would be a "better indication" of legislative intent. *Soucie* v. *David*, 448 F.2d 1067, 1077 n.39 (D.C. Cir. 1971).

vides the only comprehensive statement of insight into their agreements. The intent as expressed by the House managers is not contradicted by any statement made during final passage by the Senate.[41]

This Statement of the House Managers has been used by the lower courts in interpreting the changes which the Conference Committee made in the Act. In *Maine* v. *United States Postal Service*, the District Court cited the Statement in defining the term "attributable."

> The Commission believes this interpretation of "attributable" [i.e. volume variable costs] is thoroughly consonant with the statute. There is considerable support in the legislative history for its view. The following passage is from the statement of the House conferees in the Conference Report . . . . [405 F. Supp. 551, 558-59 (D.Me. 1975).]

---

[41] UPS incorrectly alleges that a subsequent change in Congressional procedure regarding conference rights demonstrates the lack of reliability of the Statement of the House Managers in determining Congressional intent. UPS Brief at 34-35, n.16. The Legislative Reorganization Act of 1970, P.L. 91-510 did provide thereafter that an explanatory statement on each conference report would be prepared jointly by the conferees of the two houses. This altered the practice existing at the time of passage of the Act under which only the House Conferees were required to prepare an explanatory statement. The intention was thereby to adopt ". . . for the Senate the practice [then] in effect in the House." S. Rep. No. 91-202, 91st Cong., 1st Sess. 26 (1969).

The importance of these statements of the House managers was implicitly acknowledged by the Senate Report on this Legislative Reorganization Act, as the Report stated that the adoption of the House practice would require the conferees to produce "[a] statement . . . sufficiently detailed and explicit to inform the House for which it is prepared as to *the effect which the amendments or propositions contained therein will have* upon the measure to which it related." *Id.* at 26 (emphasis added).

The authority of the House Managers' Statement was likewise acknowledged by the D.C. Circuit. *NAGCP I*, 569 F.2d at 605 (concurring opinion of Judge MacKinnon). Judge MacKinnon acknowledged the ". . . degree of approval that Congress gave to [attributing only volume variable costs] in its Report [of the House managers] . . . ." *Id.* He further noted ". . . the congressional intent expressed in this quoted portion of the Committee Report." *Id.* [42]

The Statement of the House Managers on the Federal Water Pollution Control Act Amendments of 1972 was used by this Court to understand the legislative intent of the Congress. *EPA* v. *National Crushed Stone Association*, 449 U.S. 64, 80 (1980). *See also*, *NLRB* v. *Hendricks County Rural Electric Membership Corporation*, ___ U.S. ___, 102 S.Ct. 216, 225 (1981).

The floor statements of Representative Udall of the House Post Office and Civil Service Committee and a member of the Conference Committee, prior to the House passage of the Conference Report on August 6, 1970, are also in full accord with the Statement of the House Managers. With respect to the costing methodology, Mr. Udall, who had been sponsor of H.R. 11750, noted:

> In order to guarantee that these charges would be based on fair and equitable standards for each class of mail, be it for the ordinary citizen or for the big commercial mailer, we insisted that each would pay at least the "demonstrably related costs."

---

[42] NAGCP's reliance on *D.C. Federation of Civic Associations, Inc.* v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1975) is misplaced. In that case, the Senate voiced objection to the Statement of the House Managers which had gone far beyond that which was agreed to in conference. *See*, 114 Cong. Rec. 24028, 24035 (1968).

> This phrase, while finally deleted in the final bill, was used throughout the conference to express the feeling that each class of mail pay those direct or indirect costs attributable to it.
>
> We agreed that the principle of the House bill be included in the final version of the legislation. This would establish a "floor" for each class of mail equal to costs *called "demonstrably related costs" in the House version and "attributable costs" in the final version.* Such costs consist of those costs, both direct and indirect, *which vary over the short term in response to changes in volume of a particular class* of which, even though fixed rather than variable, are the consequence of providing the specific class or service involved. *The committee felt that such costs were capable of objective determination* and proof either by empirical observation or deductive analysis. In addition to this threshold requirement, the legislation provides for a judgmental assignment of some part of the remaining costs. The judgment as to what portion of the institutional costs should be borne by each class is to be made in the light of the criteria in the bill. [116 Cong. Rec. 27606 (1970) (emphasis added) (J.L.A. at 365).]

According to well-established canons of statutory construction, statements by the floor managers during debate of a conference report are accorded weight. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 384 (1969). In the course of deliberations on a bill, legislators look to its sponsor as well as to the representative of the committee having charge of it, as one who is expected to be particularly well informed about its purpose, meaning, and intended effect. 2A C. Sands, *Sutherland Statutory Construction* § 48.15 (1973). The statements by House Conferees, both in the Conference Report and on the House floor, manifest the clear intent as noted by the

Second Circuit that only volume variable costs should be attributed under 39 U.S.C. § 3622(b).

II. THE EXERCISE OF DISCRETION BY THE POSTAL RATE COMMISSION IS ENTITLED TO SUBSTANTIAL DEFERENCE BY THE COURT ON REVIEW.

A. The Act and Judicial Decisions Support A Narrow Scope Of Review Due To The Discretion Granted To The Commission.

In its decision, the Second Circuit held that the D.C. Circuit in interpreting 39 U.S.C. § 3622(b) had "placed unwarranted and unintended restraints upon the discretionary authority of the PRC and Board in setting postal rates and fees." *Newsweek*, 663 F.2d at 1196. The Second Circuit correctly recognized that the D.C. Circuit had disregarded this Court's warning "to refrain from unwarranted intrusions into areas entrusted to agency discretion and expertise." *Id.* at 1197 (citing *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 534-58 (1978)). A review of the Act and pertinent case law demonstrates the propriety of the Second Circuit's holding.

1. The Act limits the scope of review on appeal.

Congress clearly defined in the Act the role of the courts in the postal rate-making process. It expressly provided for limited judicial review of orders of the Governors. The relevant section, in pertinent part, reads:

> The court shall review the decision, in accordance with section 706 of title 5, and chapter 158 and section 2112 of title 28, except as otherwise provided in this section, on the basis of the record before the Commission and the Governors. The court may affirm the decision or order that the entire matter be returned for further consideration, but the court may not mod-

> ify the decision. The court shall make the matter a preferred cause and shall expedite judgment in every way. The court may not suspend the effectiveness of the changes, or otherwise prevent them from taking effect until final disposition of the suit by the court. No court shall have jurisdiction to review a decision made by the Commission or Governors under this chapter except as provided in this section. [39 U.S.C. § 3628.]

Congress' intent with respect to the judiciary's power in the postal rate-making process can be evinced from the specified limitations.[43] Section 3628 restricts standing before the court to only those participants in the Commission's proceedings. The statute further limits the court's scope of review by the standards set forth in 5 U.S.C. § 706. The court, moreover, is denied the power to suspend or otherwise negate the effectiveness of the Governors' orders until final disposition of the case. The court likewise is prohibited from modifying a Governors' order. Finally, Section 3628 excludes all other bases for the court's jurisdiction in this area.

The standards incorporated from 5 U.S.C. § 706 reinforce the limitations placed on the court's scope of

---

[43] The Act's legislative history also reveals a Congressional purpose to restrain judicial involvement in postal rate-making. There was virtual unanimity within the Congress that the courts were to play a limited role. Both the Senate and the House postal reorganizational bills as reported provided for judicial review of rate decisions with similar restrictions on the court's authority. *See*, S. 3842, 91st Cong., 2d Sess. § 3704(h)(5) (1970); H.R. 17070, 91st Cong., 2d Sess. § 1256 (1970). The provisions of the Senate bill, with one amendment, became what is now 39 U.S.C. § 3628. The amendment eliminated exclusive review of rate decisions by the D.C. Circuit.

review.[44] The Second Circuit in *Newsweek* properly recognized these statutory parameters in the postal ratemaking context.

> A reviewing court may not overturn an agency finding simply because evidence existed supporting an alternative finding. Rather, in applying the *substantial evidence standard* set forth in 5 U.S.C. § 706(2)(E) we must first determine that a "reasonable mind" could not find the evidence on which the agency relied to be "adequate" to support its conclusion. [663 F.2d at 1210 (citations omitted) (emphasis added).]

---

[44] Section 706 of title 5 U.S.C., which provides the scope of review under the Administrative Procedure Act, states:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts if it is cited by a party, and due account shall be taken of the rule of prejudicial error.

The Second Circuit reiterated the appropriate standard in *Time, Inc.* v. *United States Postal Service.*

> Under 39 U.S.C. § 3628, we must assess the lawfulness of the modified rates in accordance with the standards set forth in 5 U.S.C. § 706 . . . . Among the determinations required under section 706 are whether the Board's modifications are supported by *substantial evidence* in the record and whether they are *arbitrary or capricious* or otherwise unlawful. [No. 81-4183, slip op. at 3389-90 (2d Cir. July 9, 1982) (emphasis added).]

The D.C. Circuit, likewise, acknowledged the limitations imposed on it by Section 706 in reviewing postal administrative decisions.

> Ours is only to determine whether the Postal Service lacked *substantial evidence* for rates it prescribed, took into account irrelevant considerations, omitted relevant considerations, flouted a statutory command, acted *ultra vires*, or denied a Constitutional right. [*Association of American Publishers*, 485 F.2d at 775 (emphasis added).]

Under these standards, therefore, the Court's review is a narrow one. "Substantial evidence" requires great deference as it presumes the validity of the agency's action. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971). An agency's action is not to be disturbed so long as there exists " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966). Furthermore, an agency's action may not be overturned unless the court finds it to be arbitrary and capricious.[45] The court must

---

[45] NAGCP implicitly acknowledges that the courts are to be guided by the arbitrary and capricious standard in reviewing postal administrative decisions. Brief of NAGCP at 32, 37.

consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. at 416. Such standard forbids the Court from substituting its judgment for that of the agency, *id.* at 416, and requires affirmance if a rational basis exists for the agency's decision. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

2. Fundamental principles of administrative law dictate that cour[1]s defer to the discretion and expertise of the Postal Rate Commission.

The long-standing rule of this Court has been to defer in regulatory matters to the informed experience and judgment of the administrative agency to which Congress has delegated authority. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371-72 (1973). This Court has held consistently that it is not within its power to substitute its own wisdom for that of an agency unless the action taken clearly exceeded the bounds of the authority delegated to it by Congress. *American Telephone and Telegraph Co.* v. *United States*, 299 U.S. 232, 236-37 (1936). Courts have "neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by [a] Commission." *Board of Trade* v. *United States*, 314 U.S. 534, 548 (1942). It is not enough for a party to assert that the actions taken by an agency appear to be unwise, burdensome or inferior to another. Error or lack of wisdom is not to be equated with abuse of authority. *American Telephone and Telegraph Co.* v. *United States*, 299 U.S. at 236. Instead, it must be shown that the agency's action was the "expression of a whim rather than an exercise of judgment." *Id.* at 237; *Norfolk & W.Ry. Co.* v. *United States*, 287 U.S. 134, 141 (1932).

The Court has been especially deferential in the area of rate-making. *New York* v. *United States*, 331 U.S. 284, 328 (1947). The rate-making process has been considered essentially empiric and fluid in nature. The problems involved are complicated and call for expert, informed judgment on a multitude of facts. *Board of Trade* v. *United States*, 314 U.S. at 546. The appraisal of cost figures is a task for experts, since these costs require many estimates and assumptions which cannot be proved right or wrong. *New York* v. *United States*, 331 U.S. at 328. As Justice Douglas aptly noted in a similar appeal from the order of a rate setting commission:

> [T]he determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated. [*New York* v. *United States*, 331 U.S. at 335.]

The administrative rate-maker, therefore, is left with broad discretion as long as no statutory requirement is overlooked. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 593 (1949).

Congress vested in an independent Commission the primary authority for determining the highly intricate problem of rate-making. 39 U.S.C §§ 3601-3604; S.Rep. No. 91-912, 91st Cong., 2d Sess. 4 (1970) (J.L.A. at 297). It did so because the postal rate structure was an area which required "the full-time skills of professional economists, trained rate analysts and the like." H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 5 (1970) (J.L.A. at 269). *See*, *Time*, slip op. at 3887-3888; *United Parcel Service, Inc.* v. *United States Postal Service*, 604 F.2d 1370, 1373-74 (3d Cir. 1979), *cert. denied*, 446 U.S. 957 (1980).

An integral part of that authority was the discretion to select the appropriate costing methodologies to devise rates. *Time*, slip op. at 3894. Congress laid down broad policy guidelines and left the implementation of those policies to the "full-time professional rate commissioners" to exercise their expertise. 116 Cong. Rec. 27605 (1970) (remarks of Cong. Udall) (J.L.A. at 364). Congress rejected the suggestion of imposing or recommending a particular cost accounting system. "That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law." S. Rep. No. 91-912, 91st Cong., 2d Sess. 4, 17 (1970) (J.L.A. at 297, 310). For this reason, the Commission was provided with the skilled personnel and fact-finding capabilities to determine rates. *Id.* at 13 (J.L.A. at 306).

The preeminent role of the Commission in determining the methodology upon which to set rates is borne out in the delicately balanced, procedural sections of the Act. The Act provides that the Commission is to make the evidentiary analyses and judgments required to resolve the myriad of issues involved in postal rate-making. The Commission is charged with conducting hearings on the record to accord the Postal Service and interested "users of the mails" a voice in the rate-making process. 39 U.S.C. § 3624(a). After testimony and evidence have been received, the Commission must formulate rates based on the nine factors specified forth in 39 U.S.C. § 3622(b). To insure that the extensive hearings held before the Commission were not a futile exercise, Congress limited the options available to the Governors once they received the Commission's recommended decision. The Governors can approve, disapprove or allow under protest the Commission's recommendations. 39 U.S.C. § 3625. And although the Governors may modify reconsidered decisions, that authority also is limited. 39 U.S.C.

§ 3625(d). Only where the Governors find on the basis of the record that the methodology is likely not to produce required revenue are they empowered to reject the methodology. *Time*, slip op. at 3888.

B. The Commission Has Consistently Interpreted Its Enabling Act To Attribute Only Volume Variable Costs.

To the extent that decisions of the Commission involve interpretations of the Postal Reorganization Act, the decisions of this Court require that such interpretations also be accorded judicial deference. *Udall* v. *Tallman*, 380 U.S. 1, 16 (cited in *Newsweek*, 663 F.2d at 1196-1197). The degree of deference required is particularly great when, as here, the agency's responsibilities relate to a complex activity and the agency has developed the expertise needed to carry out these responsibilities. B. Mezines, *et al.*, *Administrative Law* 51-6 to 51-7 (1977). The agency's construction of a statute need not be the only one possible, so long as it is reasonable. *Udall* v. *Tallman*, 380 U.S. at 16. Deference is further dictated when Congress is apprised of an agency's interpretations but makes no attempt to alter them. *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. at 248, 251-52.

One issue upon which the Commission and the Postal Service have agreed throughout the five major rate proceedings has been the meaning of the words "attributable" costs in 39 U.S.C. § 3622(b).[46] Attributable costs consistently have been defined by both Government agencies as being those costs which vary with volume together with specific fixed costs.[47]

---

[46] Minor deviations from this consistency were adopted by the PRC in Docket No. R80-1 as a result of the D.C. Circuit's decisions.

[47] H.R. Rep. No. 91-1363, 91st Cong., 2d Sess. 87 (J.L.A. at 334).

In the very first rate case, Docket No. R71-1, the Postal Service presented its first effort to allocate costs on the basis of causal connection. The Commission observed that "the Service's method is founded upon the principle that a cost should be classified as 'attributable' if it varies in direct proportion to mail volume on a year-to-year basis."[48] In approving this definition, the Commission found that the Postal Service's concept of attributable costs was a reasonable approach under the conditions which typified postal operations.[49] Reviewing the Commission's opinion in Docket No. R71-1, the Governors "endorse[d] and adopt[ed] the very lucid explanation in the Commission's opinion of why the Service's total revenue requirement should be apportioned among the individual mail categories as recommended by the Commission."[50]

The Commission reiterated its interpretation of "attributable costs" in the second rate proceeding, Docket No. R74-1. It viewed "[t]he attributable costs under the statute [as] compris[ing] both the first step in the assignment of all postal costs and the minimum rates for preferred classes of mail."[51] The Commission deemed it essential that "these costs be related to volume variability, if we are to ascertain and causally relate costs to the mail classes and services."[52] The Governors upon review again concurred with this interpretation. "The Commission has

---

[48] Postal Rate Commission, Opinion and Recommended Decision ("PRC Op."), Docket No. R71-1, at 48.

[49] *Id.* at 53.

[50] Decision of the Governors of the United States Postal Service ("Decision of the Governors"), Docket No. R71-1, at 3 (June 29, 1972).

[51] PRC Op. R74-1, at 111.

[52] *Id.*

now persuasively established for future postal rate-making the principle of acceptable costing methodology, including attribution of variable costs and assignment of institutional costs to the several classes and subclasses of mail. . . ."[53]

The Governors' decision in Docket No. R74-1 gave rise to the D.C. Circuit's opinion in *NAGCP I*. The Court declared therein that the Commission's methodology which attributed costs solely on the basis of volume variability was insufficient. *NAGCP I*, 569 F.2d at 586. Instead, the D.C. Circuit stated that the Commission should achieve greater attribution of costs through the use of "cost allocation formulae based on accounting principles." *Id.* This would extend attributable costs to include those additional costs which, although not variable and therefore not directly attributable, could nevertheless be said to be the consequence of providing the service. *Id.*

In Docket No. R76-1, the Commission reaffirmed its view of attributable costs. It observed that "[i]n R74-1, we held that volume variable costing is the proper method for obtaining attributable postal costs."[54] The methodology was not changed and the Governors concurred.[55]

The impact of *NAGCP I* was not felt until the fourth general rate proceeding. The Commission, however, in Docket No. R77-1 did not "attribute" costs to the extent directed by the D.C. Circuit. Rather, the Commission continued to use volume variability as the exclusive factor in determining whether certain costs could be attributed. The D.C. Circuit's opinion was interpreted as not impos-

---

[53] Decision of the Governors, Docket No. R74-1, at 7 (Sept. 4, 1975).

[54] PRC Op. R76-1, at 75.

[55] Decision of the Governors, Docket No. R76-1, at 2 (July 7, 1976).

ing a specific economic theory.[56] Adhering to its previous opinion in Docket No. R74-1, the Commission pointed out that the Postal Service had collected data on longer-run variable costs not available in the previous rate proceedings. Such data would permit the "extended attribution" required by the Court, and at the same time maintain the distinction between "attribution" (of variable costs) and "assignment" (of fixed costs).[57] The Governors firmly supported the Commission's costing and pricing principles. Acknowledging that *NAGCP I* may require greater attribution than the Commission decided, the Governors nevertheless strongly endorsed the Commission's views.[58]

In the most recent proceeding, the Commission continued to make this distinction between attributable and assignable costs. An "attributable" cost was volume variable, either in the short-run or the longer-run. All other causally related costs were assigned. (2d Cir. J.A., Vol. IV, at 138-39.) The Commission concluded that the D.C. Circuit had accepted this distinction in the context of its review of Docket No. R77-1. The Commission found that the longer-run cost data which raised the level of variable costs met the Court's requirement for extended attribution. *Id.* at 140.

The Commission has consistently defined the term "attributable costs" to require volume variability. The Commission's construction has been reiterated on the public record and before the courts. Congress has been aware of this interpretation and has taken no action to

---

[56] PRC Op. R77-1, at 80.

[57] *Id.* at 83-84.

[58] Decision of the Governors, Docket No. R77-1, at 4 (May 19, 1978). As no party challenged the order for insufficient attribution, the Court in *NAGCP III* did not address the issue.

modify it. The Second Circuit's affirmance of the Commission's interpretation should be upheld.

C. The Commission's Use Of The Service-Related Cost Methodology Is Within The Discretion Accorded By The Act And Should Be Upheld.

In Docket No. R77-1, the Commission after extensive testimony, including the strong support of Postal Service witnesses, adopted the concept of service-related costs as a method of identifying relationships between classes of mail and costs which were not based on volume variability. These were the extra costs incurred in order to meet the stringent delivery standards for preferential mail. These additional costs were assigned to the preferential classes of mail which caused them.[59] Use of service-related costs was affirmed by the D.C. Circuit in *NAGCP III*, 607 F.2d at 434. In Docket No. R80-1, the Commission, in the absence of any testimony to the contrary, continued to assign costs based on this service-related costing method (2d Cir. J.A., Vol. IV, at 151). The Second Circuit in *Newsweek* found that the use of service-related costs was within the Commission's discretionary authority under the Act. 663 F.2d at 1202-03. The Commission's use of the methodology is consistent with record evidence, judicial mandate, and the Act's requirements.

1. Rejection of the methodology is not supported by the record.

The service-related cost concept was introduced by the Postal Service and supported by its expert witnesses in Docket No. R77-1.[60] Following extensive litigation of the

---

[59] *See*, p. 6 n.6, *supra*.

[60] PRC Op. R77-1, at 94-101. The relevant portions of the Commission's opinion in Docket No. R77-1 have been lodged with this Court in a file entitled "Postal Service Exhibits in Docket Nos. 81-4035, *et al.*"

issue, the Commission adopted the methodology as a proper means of assigning certain non-volume variable costs,[61] and the concept received judicial approval in *NAGCP III*, 607 F.2d at 404.

For reasons never explained on the record, the Postal Service abandoned the service-related costing approach in Docket No. R80-1. No party, however, introduced evidence challenging any aspect of the detailed theoretical and operational analysis underlying the service-related cost methodology.[62] In fact, during the course of the proceedings the Postal Service did not reject the concept out of hand (2d Cir. J.A., Vol. IV, at 146-153). Instead, USPS offered several unsupported objections concerning its implementation which previously had been raised by other parties and rejected by the Commission,[63] and the Court of Appeals in *NAGCP III*, 607 F.2d at 407-412.

The evidence in Docket No. R80-1 did not contravene the essential concept of service-related costs. Having before it no testimony to refute its previous findings or to establish different circumstances in the present proceeding, the Commission found that the best record evidence remained that of the Postal Service in Docket No. R77-1 (2d Cir. J.A., Vol. IV., at 153). Under these circumstances, there was no basis for disturbing its determination that service-related costs was a proper methodology.

---

[61] *Id.* at 123.

[62] The Commission commented that "[t]here is hardly any discussion in the R80-1 record, either in testimony or on brief, of the theory or application of the service-related costing concept." Second Opinion at 70. Subsequently, it observed that "[w]hat was lacking on the R80-1 record was an alternative costing technique which would have complied with the statutory requirements (as judicially construed)." Third Opinion at 43.

[63] PRC Op. R77-1, at 15, 106-121.

In rejecting service-related costs, the Governors in their First Decision asserted that current economic circumstances called into question the hypothetical assumptions underlying the concept (Pet. App. at 13b). As noted above, however, no testimony was introduced by the Postal Service or any other party to refute the assumptions of the methodology. Moreover, the Governors' assertions were contradicted by the position maintained by the Postal Service in Docket No. R77-1 and the evidence adduced therein.[64] There was nothing in the record to support a rejection of the Commission's selection of methodology.

2. The lower courts agree that the methodology comports with the Act and is within the Commission's discretion.

The Circuit opinions do not conflict on the issue of the service-related costs. Both the Second Circuit in *Newsweek* and the D.C. Circuit in *NAGCP III* have affirmed the Commission's discretion to utilize this methodology.

In *NAGCP III*, the D.C. Circuit thoroughly examined the concept. 607 F.2d at 404-412. It reviewed the exhaustive testimony of USPS witnesses in support of the methodology and the Commission's findings in approval thereof. *Id.* at 406-407. Deferring to the Commission's expert judgment on the matter, the Court found "this method of allocation to be reasoned, nonarbitrary and congruent with the legislature's objective." *Id.* at 404. In dismissing numerous challenges to it, the Court stated that mathematical precision in developing new ratemaking methods was not necessary, and that the mere articulation of imperfections in a method would not alone

---

[64] *See*, Second Opinion at 106.

defeat it. It recognized that there was wide scope for the exercise of judgment and discretion by the Commission. *Id.* at 408.

The Second Circuit dismissed a challenge to service-related costs in the case below. While rejecting the D.C. Circuit's holding that service-related costs or some similar methodology was *required*, the Court concluded that the concept "is not an unreasonable methodology to use in assigning costs." *Newsweek*, 663 F.2d at 1202-1203. The Court agreed with the D.C. Circuit that "[w]hile some of its assumptions are . . . optimistic, we cannot say that the system is so unrealistic a model as to call into question the rationality of the conception underlying service related costs." *Id.* at 1203 (quoting *NAGCP III*, 607 F.2d at 409-10.)[65]

Two appellate courts, then, have reviewed and accepted service-related costs as falling within the Commission's discretion. Although the analysis differs, both courts properly have deferred to the Commission's expertise in selecting the proper methodology in formulating postal rates and fees. This Court should affirm the opinions of the Second Circuit and D.C. Circuit with respect to service-related costs.

---

[65] In *Time*, the Second Circuit reaffirmed its position that while by no means mandatory in application, the concept of service-related costs was not irrational and could therefore be used in formulating rates. Slip. op. at 3893-3894. It held, moreover, that the burden was on the Governors to justify its rejection of the service-related cost concept. *Id.* at 3898.

CONCLUSION

The Second Circuit in *Newsweek* was correct in holding that the Commission's rate-making procedures were consistent with the provisions of 39 U.S.C. Section 3622(b). The Act's legislative history supports and requires the Commission's limitation of "attributable costs" under Section 3622(b) to those which vary with volume and its selection of costing methodologies in setting postal rates.

The Second Circuit properly found that the D.C. Circuit's interpretation of Section 3622(b) placed an unwarranted restraint upon the Commission's discretionary authority. The Court in *NAGCP I* and *NAGCP III* failed to accord the required deference to the Commission's interpretation of matters clearly entrusted to discretion by the Congress.

The Second Circuit's opinion in *Newsweek* should be affirmed.

Respectfully submitted,

WILLIAM J. OLSON, ESQ.*
JAMES E. GATES, ESQ.
SMILEY, OLSON & GILMAN
Suite 600
1815 H Street, N.W.
Washington, D.C. 20006
(202) 466-5100

ALAN R. SWENDIMAN, ESQ.
JACKSON, CAMPBELL & PARKINSON
Suite 300 South
1120 - 20th Street, N.W.
Washington, D.C. 20036
(202) 457-1600

**Counsel of Record*

Counsel for Intervenors:
March of Dimes Birth Defects Foundation
American Lung Association
National Easter Seal Society
St. Jude Children's Research Hospital
American Cancer Society
National Wildlife Federation

September 7, 1982

Respondent's Brief

7

Office - Supreme Court, U.S.
FILED
SEP 7, 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS NEWSWEEK, INC. AND TIME INCORPORATED

JOHN M. BURZIO
Counsel of Record
THOMAS W. MCLAUGHLIN
HYDEMAN, MASON, BURZIO & LLOYD
1220 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 775-0725
Counsel for Time Incorporated

TONI K. ALLEN
Counsel of Record
ROBERT M. LICHTMAN
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

DIANA M. DANIELS
NEWSWEEK, INC.
444 Madison Avenue
New York, New York 10022
(212) 350-2530
Counsel for Newsweek, Inc.

September 7, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the postal agencies' contemporaneous interpretation of the Postal Reorganization Act, 39 U.S.C. § 3622(b)—under which postal costs are divided for ratesetting purposes into "attributable" costs and "all other" costs, with costs to be "attributed" to individual classes of mail where a casual connection can be shown by objective proof and "all other" costs to be allocated to the mail classes according to the noncost standards of the statute—was reasonable and entitled to be upheld by reviewing courts.

LIST OF PARTIES IN THE COURT BELOW

The parties in the court below are listed in the Brief of Petitioner United Parcel Service of America, Inc.

The parent company and affiliates (except wholly-owned subsidiaries) of Newsweek, Inc. are listed in the Joint Memorandum of Respondents Dow Jones & Company, Inc. and Newsweek, Inc. in Support of Certiorari, except that Publishers Phototype, Inc. is no longer an affiliate of Newsweek, Inc.

The affiliates and subsidiaries (except wholly-owned subsidiaries) of Time Incorporated are as follows:

Adolph Coors & Co.
American Cablevision of Indianapolis, Inc.
American Cablevision of Kansas City, Inc.
American Cablevision of Pennsylvania, Inc.
American Cablevision of St. Louis, Inc.
American Family Publishers
American Heritage Cablevision, Inc.
American Television of Midwest City, Inc.
Area Communications, Inc.
ATC Cablevision of South Pasadena, Inc.
ATC Cablevision of San Marino, Inc.
Atrium Development Co.
Bartlesville Video, Inc.
Birmingham Cable Communications, Inc.
Boyd Stott & McDonald Tek, Ltd.
Cablevision of Durham, Inc.
Century Venture Corporation
Champaign-Urbana Communication, Inc.
Colorado Springs Cablevision, Inc.
Continental Cablevision of Richmond, Inc.
Editions Robert Laffont
Editorial Novaro
Erie Telecommunications, Inc.
Explosive Fabricators, Inc.
Filmways, Inc.

Frontier Cablevision, Inc.
Geomet, Inc.
Georgia Kraft Company
Hankook Ilbo Time-Life Ltd.
Harima, M.I.D., Inc.
Hawkeye Cable Vision Corp.
Highland Court Clubs
Home Savings and Loan-Lufkin
Hong Kong Television
Honolulu Television and Communications Corp.
JLW III
Laurel Cablevision, Inc.
Lemon Tree
Love Wood Products
Lower Bucks Cablevision, Inc.
Medecine Etsciences
Medical Science International-Brazil
Medical Science International-Japan
Memphis CATV, Inc.
Menlo Venture Corp.
Muscatine Television and Communications Corporation
N.E.W. Media, Inc.
Norman Cable TV, Inc.
Owens-Illinois De Puerto Rico Papelera De Canarias
President Incorporated
Private Channel Club of Miami
Private Investment Co. for Asia
Public Cable Company
Rock-Time Inc.
Rowohlt-Germany
Sandhill Community Antenna Corp.
Security & Guaranty Abstract Company
Shingakusha-Time
S.W. Forest Products
Temple-White Company, Inc.
Texas Boundaries-Lufkin

Threshold Technology Inc.
Time-Life Microsonics Inc.
Universal Press Syndicate
U.S.A. Network
Vista Cablevision, Inc.
West Allis Cablevision
Wheelabrator-Frye Inc.
Wolverine Cablevision, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	vii
STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
The Postal Agencies' Interpretation of 39 U.S.C. § 3622(b)	6
The D.C. Circuit's Decisions and the Postal Agencies' Consequent Revisions in Ratemaking Methodology	9
This Proceeding	14
SUMMARY OF ARGUMENT	17
ARGUMENT	21
I. THE POSTAL AGENCIES' CONSISTENT INTERPRETATION OF SECTION 3622(b), BEFORE THE D.C. CIRCUIT INTERVENED, IS REASONABLE AND ENTITLED TO ACCEPTANCE BY THE COURTS	21
A. The Agencies' Interpretation Is Fully Consistent with the Language of Section 3622(b)	24
B. The Legislative History of Section 3622(b) Supports the Agencies' Construction	26
1. The Kappel Commission Report	27
2. The House Bills (H.R. 11750, H.R. 17070)	28

3. The Senate Bill (S. 3842) 31

4. The Conference Bill 32

C. The Agencies' Interpretation Is Consistent with Subsequent Actions of Congress 38

D. The Agencies' Interpretation Accords Fully with Congress' Policy Goals Under the Act.. 41

1. The "Getting Politics Out of the Post Office" Argument 42

2. The Discrimination and Cross-Subsidy Argument 43

3. The "Subjectivity" of the Noncost Factors Argument 45

II. OTHER ISSUES IN THIS CASE STEM FROM THE D.C. CIRCUIT'S ERRONEOUS INTERPRETATION OF THE STATUTE AND, SINCE THE AGENCIES MUST BE GIVEN THE OPPORTUNITY TO CONSIDER THEM UNDER A CORRECTED LEGAL STANDARD, SHOULD NOT BE DECIDED BY THIS COURT 47

CONCLUSION 50

TABLE OF AUTHORITIES

CASES: Page

Addison v. Holly Hill Fruit Products, 322 U.S. 607 (1944) 48
Association of American Publishers, Inc. v. Governors of the United States Postal Service, 485 F.2d 768 (D.C. Cir. 1973) 5, 7, 16, 39
Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir. 1978) 35
Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) 39
Federal Election Commission v. Democratic Senatorial Campaign Committee, 102 S. Ct. 38 (1981) 18, 22, 23
Girouard v. United States, 328 U.S. 304 (1960) 39
Hannegan v. Esquire, Inc., 327 U.S. 146 (1946) 5
Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653 (9th Cir. 1980) 35
ICC v. Clyde S.S. Co., 181 U.S. 29 (1901) 48
Jones v. Liberty Glass Co., 332 U.S. 524 (1947) 39
National Association of Greeting Card Publishers v. United States Postal Service, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) 4, 5, 9, 10, 11, 24, 25, 26, 40, 42, 43
National Association of Greeting Card Publishers v. United States Postal Service, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 5, 13, 45
National Association of Greeting Card Publishers v. United States Postal Service, Nos. 76-1611 *et al.* (D.C. Cir. June 27, 1978) 9
Newsweek, Inc. v. United States Postal Service, 663 F.2d 1186 (2d Cir. 1981) ..... *passim*
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974 48
NLRB v. International Longshoremen's Association, 447 U.S. 490 (1980) 21, 48
NLRB v. Pipefitters Local 638, 429 U.S. 507 (1977) 48
Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) 23
SEC v. Chenery Corp., 318 U.S. 80 (1943) 49

TABLE OF AUTHORITIES—Continued

	Page
Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971)	35
Time, Inc. v. United States Postal Service, No. 81-4183 (2d Cir. July 9, 1982)	15
Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975)	18, 22, 23
Udall v. Tallman, 380 U.S. 1 (1965)	21, 22
Unemployment Commission of the Territory of Alaska v. Aragon, 329 U.S. 143 (1946)	22
United States v. Price, 361 U.S. 304 (1960)	39
Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975)	35
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978)	24
Zenith Radio Corp. v. United States, 437 U.S. 443 (1978)	22, 23
Zuber v. Allen, 396 U.S. 168 (1969)	38, 39

ADMINISTRATIVE DECISIONS:

Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R71-1 (June 5, 1972)	6, 7
Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R74-1 (Aug. 28, 1975)	7, 8, 9, 25
Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R76-1 (June 30, 1976)	7
Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R77-1 (May 12, 1978)	11, 12, 13
Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R80-1 (Feb. 19, 1981)	14, 25, 46
Decision of the Governors of the United States Postal Service (July 6, 1972)	7
Decision of the Governors of the United States Postal Service (Sept. 4, 1975)	7
Decision of the Governors of the United States Postal Service (July 7, 1976)	7

TABLE OF AUTHORITIES—Continued

	Page
Decision of the Governors of the United States Postal Service (May 19, 1978)	11, 13
Decision of the Governors of the United States Postal Service (March 10, 1981)	14, 15
Decision of the Governors of the United States Postal Service (Sept. 29, 1981)	15, 17
STATUTES:	
Act of February 28, 1925, ch. 368, § 202, 40 Stat. 1066	5
Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*	
Section 10(e), 5 U.S.C. § 706	23
The Classification Act of 1879, ch. 180, §§ 7 & 10, 20 Stat. 358	5
Postal Reorganization Act of 1970, 39 U.S.C. §§ 101 *et seq.*	3
Section 101	23
Section 201	3, 42
Section 202(a)	23, 42
Section 401	23
Section 403	23, 44
Section 404	42
Section 1002	42
Section 3601	3, 23, 42
Section 3603	23
Section 3621	3, 23
Section 3622(a)	3
Section 3622(b)	*passim*
Section 3622(b)(3)	4, 9, 10, 11, 24, 25, 26, 32, 33, 38, 39
Section 3622(b)(8)	5
Section 3623	23
Section 3624	3, 23, 43
Section 3625	4, 15
Section 3626(a)(1)	7, 33
Section 3628	4, 23
Postal Reorganization Act Amendment of 1976, Pub. L. No. 94-421, § 10, 90 Stat. 1311	5, 20, 39

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS: Page

Bills:

S. 3842, 91st Cong., 2d Sess. (1970) 17, 31
H.R. 11750, 91st Cong., 1st Sess. (1969) 28
H.R. 17070, 91st Cong., 2d Sess. (1970) 19, 30
H.R. 7700, 95th Cong., 1st Sess. (1977) 40

Reports:

H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970) 27, 30, 42
H.R. Rep. No. 1363, 91st Cong., 2d. Sess. (1970) 19, 34
H.R. Rep. No. 808, 95th Cong., 1st Sess. (1977) 40
S. Rep. No. 912, 91st Cong., 2d Sess. (1970) .. 27, 31, 32
S. Rep. No. 1191, 95th Cong., 2d Sess. (1978) .. 40
S. Rep. No. 1244, 95th Cong., 2d Sess. (1978) .. 41

Hearings:

Postal Modernization: Hearings Before the Senate Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) .. 19, 29, 37, 41
Postal Rates and Revenue and Cost Analysis: Hearings Before the House Subcommittee on Postal Rates, 91st Cong., 2d Sess. (1970) 28, 30, 33

Congressional Record:

116 Cong. Rec. 22,051 (1970) 32
116 Cong. Rec. 22,053 (1970) 32
116 Cong. Rec. 27,602 (1970) 37
116 Cong. Rec. 27,606 (1970) 20, 35, 36, 37
116 Cong. Rec. 26,953 (1970) 34
121 Cong. Rec. 30,777-84 (1975) 39
122 Cong. Rec. 29,747-48 (1976) 39
124 Cong. Rec. 8857-62 (1978) 39

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS: Page

Towards Postal Excellence: The Report of the President's Commission on Postal Organization (June 1968) (Kappel Report) 18, 27, 28, 37, 41, 44, 45

R. Leftwich, *The Price System and Resource Allocation* (7th ed. 1979) 37

D. Watson, *Price Theory and Its Uses* (2d ed. 1968) 37

Report of the Commission on Postal Service (April 1977) 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1304

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

No. 81-1381

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS NEWSWEEK, INC. AND TIME INCORPORATED

STATUTES INVOLVED

39 U.S.C. § 3622(b) provides as follows:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:

(1) the establishment and maintenance of a fair and equitable schedule;

(2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;

(3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;

(4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

Other pertinent sections of the Postal Reorganization Act, 39 U.S.C. §§ 101 *et seq.*, are set forth in Appendix C to the Petition in No. 81-1304.

STATEMENT OF THE CASE

This case, arising out of the fifth and most recent general postal rate proceeding, involves review of an order of the Governors of the United States Postal Service, dated March 10, 1981, which allowed to take effect, under protest, a recommended decision of the Postal Rate Commission setting postal rates and fees.

Prior to enactment of the Postal Reorganization Act in 1970, 39 U.S.C. §§ 101 *et seq.* ("the Act"), Congress itself set postal rates. Under the Act, it relinquished that function and established the United States Postal Service ("Postal Service" or "Service") and the Postal Rate Commission ("Commission") as "independent establishment[s] of the executive branch" (39 U.S.C. §§ 201, 3601), each with a role in setting rates.

The Governors of the Postal Service are authorized "to establish . . . reasonable and equitable rates of postage and fees for postal services in accordance with the provisions of" Chapter 36 of the Act. 39 U.S.C. § 3621. These rates and fees must "provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service." *Id.*

Whenever the Postal Service determines that changes in postal rates or fees "would be in the public interest and in accordance with the policies of" the Act, it "shall request the Postal Rate Commission to submit a recommended decision on" such changes. 39 U.S.C. § 3622(a). Upon receiving such a request, the Commission, after providing opportunity for a hearing on the record (39 U.S.C. § 3624), is required by 39 U.S.C. § 3622(b) to "make a recommended decision on the request . . . in accordance with the policies of this title and" nine listed "factors." The Governors then have final authority to act

upon the Commission's recommended decision in accordance with 39 U.S.C. § 3625.[1]

The issue in this proceeding concerns the appropriate method of applying the nine "factors" listed in 39 U.S.C. § 3622(b) in the determination of rates for individual mail categories. The statutory factors include establishment of a fair and equitable schedule; the value of the service provided each class of mail; the effect of rate increases upon the general public, business mail users and private delivery companies; available alternative means of sending mail; and the educational, cultural, scientific, and informational value to the recipient of mail matter. Central to the issue in dispute is the meaning of still another "factor" (the third on the statutory list), namely, "the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." 39 U.S.C. § 3622(b)(3).

In the first three general postal rate proceedings after passage of the Act, the Postal Service and the Commission adopted and followed a consistent interpretation of § 3622(b). Subsequently in the next two general rate cases, under the compulsion of a series of decisions of the District of Columbia Circuit,[2] the agencies believed them-

---

[1] The Governors may (1) approve the Commission's recommended decision, (2) allow it to take effect under protest and either seek judicial review or resubmit it to the Commission, or (3) reject and resubmit it to the Commission for reconsideration. In the latter event, the Commission's "further recommended decision" again is subject to review by the Governors who may approve it, allow it to take effect under protest, or reject and resubmit it; alternatively, they may modify the new decision, if they are unanimous and make certain prescribed findings. 39 U.S.C. § 3625. A decision of the Governors is reviewable in any court of appeals, which "may affirm the decision or order that the entire matter be returned for further consideration" but which "may not modify the decision." 39 U.S.C. § 3628.

[2] *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to*

selves to be forced to adopt a substantially changed methodology. In this case, the rates recommended by the Commission were based on the D.C. Circuit's interpretation of § 3622(b); the Governors allowed the rates to take effect under protest and expressed disagreement with the D.C. Circuit's view. App. B to Petition in No. 81-1304, at 1b, 14b.

This decision of the Governors was appealed to the Second Circuit by Newsweek, Inc. and Time Incorporated (hereinafter "Publishers"), as well as the Magazine Publishers Association, all respondents in this Court, who challenged as unlawful the second class mail rates determined by the Commission in conformity with the D.C. Circuit's methodology.[3] The Second Circuit, rejecting the D.C. Circuit's interpretation, remanded the case to the Governors for further consideration. *Newsweek, Inc. v. United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981) (Appendix A to Petition in No. 81-1304). This Court granted certiorari.

---

other issues, 434 U.S. 884 (1977) (*"NAGCP I"*); *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (*"NAGCP III"*). *See Association of American Publishers, Inc. v. Governors of the United States Postal Service*, 485 F.2d 768, 776 (D.C. Cir. 1973) (concurring opinion) (*"American Publishers"*).

[3] The grant of second class mailing privileges to periodicals reflects Congress' policy "to encourage the distribution of periodicals which disseminated 'information of a public character' or which were devoted to 'literature, the sciences, arts, or some special industry,' because it thought that those publications as a class contributed to the public good." *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 154 (1946) (citations omitted). Magazines have been accorded second class mailing status at least since The Classification Act of 1879, ch. 180, §§ 7, 10, 20 Stat. 358-59. See also Act of February 28, 1925, ch. 368, § 202, 43 Stat. 1066. In 1976, Congress amended § 3622(b) to add as a ratemaking "factor," required to be considered by the Commission, "the educational, cultural, scientific, and informational value to the recipient of mail matter." 39 U.S.C. § 3622(b)(8) (as amended by Pub. L. No. 94-421, § 10, 90 Stat. 1311).

The Postal Agencies' Interpretation of 39 U.S.C. § 3622(b)

In the first general mail rate proceeding under the Act (Commission Docket No. R71-1), the Commission and the Postal Service construed § 3622(b) as contemplating a two-step procedure for apportionment of the Service's total "revenue requirement" among individual mail categories.[4]

The postal agencies first determined the level of "attributable" costs. The Commission stated that "[t]he role of costing in postal ratemaking takes on special significance because the Act includes the 'requirement' that each class of mail or type of service must—as a *minimum*—produce revenues sufficient to cover the costs attributable to that class or service [§ 3622(b)(3)]." Opinion and Recommended Decision at 1-275 (emphasis in original). The Commission, finding on the basis of legislative history that the Act did not mandate any particular costing methodology,[5] accepted as "a reasonable approach under [present] conditions" the Service's proposed method of determining "attributable" costs (*id.* at 1-278), which was "founded upon the principle that a cost should be classified as 'attributable' if it varies in direct proportion to mail volume on a year-to-year basis." *Id.* at 1-277. Under that method, about one-half of the Service's total costs were "identified" as "attributable." *Id.* at 1-275.

The remaining costs, termed "institutional," were "assigned by a judgmental assessment of the pricing and market factors" using the noncost factors of § 3622(b).

---

[4] Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R71-1 (June 5, 1972). (Citations to this decision are to the permanent bound edition.)

[5] It found, however, that Congress had rejected a fully-allocated cost approach, under which all of the Service's costs would be allocated to individual mail categories using cost accounting formulae and "cost-of-service principles." *Id.*

Id.[6] Cost, as the Commission emphasized, "is by no means the sole criterion of postal ratemaking." *Id.*[7]

In the next two postal rate proceedings, Docket Nos. R74-1 and R76-1, the postal agencies refined but made no basic change in their allocation methods.[8] The two-step methodology followed by the agencies was described by the Commission in *R74-1*:

> Under our method of attributing Postal Service costs, variable costs are those which vary with the volume of postal business over a reasonable "planning cycle." Our procedure requires us, first, to review carefully the behavior of costs to determine which of them are caused by individual mail classes. We apply an average cost to a class or subclass of mail when related costs increase with an increase in business volume. When the related costs do not behave in this way, we treat them as "institutional" and do not attribute them. Instead, institutional costs are pooled

---

[6] Consistent with 39 U.S.C. § 3626(a)(1), "institutional" costs were not assigned to so-called preferred classes of mail, such as the non-profit mail categories.

[7] The Commission's recommended decision was approved by the Governors. Decision of the Governors of the United States Postal Service (July 6, 1972). The Governors' decision was upheld by the D.C. Circuit in *American Publishers*, 485 F.2d 768 (D.C. Cir. 1973). In an opinion by Senior District Judge Wyzanski, the court noted that "the factors listed [in § 3622(b)] are not analogous to a table of atomic weights, or to the multiplication table" and found that the Commission and the Governors "made their appraisals with a correct understanding of the Congressional mandate." *Id.* at 774, 775. But a concurring opinion of Chief Judge Bazelon (in which all three panel members joined), although recognizing that "[s]ection 3622(b)(3) is susceptible of a variety of interpretations" (*id.* at 779), was critical of the agencies' approach and foreshadowed the court's later decisions in *NAGCP I* and *NAGCP III* (*see* pp. 9-13, *infra*).

[8] Opinions and Recommended Decisions of the Postal Rate Commission, Docket No. R74-1 (Aug. 28, 1975), and Docket No. R76-1 (June 30, 1976); Decisions of the Governors of the United States Postal Service (Sept. 4, 1975 and July 7, 1976).

> for direct assignment to the classes on the basis of the standards of § 3622(b). In this way, total costs are allocated to all the classes and services in order to arrive at a fair and equitable rate structure which enables the Postal Service to attain its revenue requirement.[9]

The Commission's opinion in *R74-1* contains a detailed review of the background and legislative history of § 3622 (b) and an exhaustive discussion of costing methodology. *Id.* at 4-7, 76-145. The legislative history of § 3622(b), it concluded, shows that "Congress divided postal costs into 'attributable' and 'all other,'" with the latter category to "be assigned to the classes of mail in accordance with statutory standards on a judgmental basis." *Id.* at 93. The Commission found that costs may properly be "attributed" only where a finding of causality can be made.

> The statute that Congress enacted requires us to distinguish between attributing costs on a causal basis and assigning the remaining mass of common costs which benefit all or a limited number of services. The key to this distinction lies in an analysis of cost behavior which will lead to a separation of the costs *caused* by the classes and services from all other costs. . . . Before we can distribute costs on that basis, however, we need to know which specific costs change in relation to changes in output or volume.

Id. (emphasis in original). Such volume-related costs, the Commission stated, include "indirect" costs. *Id.* at 101.[10] It also found that "specific fixed costs"—"those directly

---

[9] Opinion and Recommended Decision at 5-6 (footnote omitted). In attributing costs that are volume-variable over a "reasonable 'planning cycle,'" the Commission modified the Service's methodology, which it had accepted in *R71-1*, of measuring volume variability on a year-to-year basis. *See id.* at 132-35.

[10] It gave as an example of attributable indirect costs "various fringe benefits, with the direct labor costs and supervisory costs of attributable direct labor at the first level of supervision . . . but not at higher levels of supervision." *Id.*

identifiable with a single class of service"—may properly be "attributed." *Id.* at 100.

The Commission concluded that "[w]here an analysis based on causation cannot be made because data are lacking, we will do better to acknowledge that fact and press for a better data base than to construct an 'attribution' on a basis not contemplated by the statute." *Id.* at 110-11. Section 3622, it believed, "does not require the maximum attribution of costs to the mail classes irrespective of variability considerations. Interpreting the statute to require allocations to be made merely to maximize the attributions would be inconsistent with the statute's purposes and goals, and with sound business judgment." *Id.* at 122. "[T]here are," the Commission stated, "substantial fixed costs within the postal system" —costs "not affected by a change in the volume of any class or service." *Id.* at 120. Such costs (except for "specific fixed costs") "are a burden to be borne by the classes to the extent they are able to bear such costs under the noncost criteria of the statute." *Id.*

In making assignments under the noncost criteria of the statute, the Commission relied principally on a "demand elasticity" or value-of-service approach, which assigned costs on the basis of the relative elasticity of demand of each of the mail classes.

The D.C. Circuit's Decisions and the Postal Agencies' Consequent Revisions in Ratemaking Methodology

In *NAGCP I*, which reviewed the decision in *R74-1*, the D.C. Circuit took a sharply different view of the statute.[11] It found in § 3622(b)(3) a "plain command" that the Commission "maximize the use of cost-of-service

[11] The third general postal rate proceeding (Docket No. R76-1) was decided during the pendency of *NAGCP I*. Appeals from the Governors' decision were dismissed as moot. *National Ass'n of Greeting Card Publishers v. United States Postal Service*, Nos. 76-1611 *et al.* (D.C. Cir. June 27, 1978).

principles." 569 F.2d at 590. With respect to the "attribution" language of § 3622(b)(3), the court stated that "a process of extended attribution"—one not solely dependent on cost variability—was required. *Id.* at 586.[12] As to "the other costs of the Postal Service that are to be 'reasonably assigned,'" the court found that these also must be allocated on "cost-of-service principles." *Id.*[13] Only a "third category of costs," which can be neither attributed nor reasonably assigned, would be subject to allocation on the basis of the noncost factors in § 3622(b). *Id.* at 587.

According to the D.C. Circuit, the Act mandated a three-step ratemaking methodology.

> Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

Id. at 589 (footnote omitted). This interpretation, the court said, was supported both by the language of § 3622(b)(3)—particularly Congress' use of the word "requirement"—and by its legislative history. *Id.* at 585-89.

---

[12] The attribution process, it believed, "necessitates the use to some degree of cost allocation formulae based on accounting principles." 569 F.2d at 586.

[13] Assignment, the court said, "permits a greater degree of estimation and connotes somewhat more judgment and discretion than" attribution. *Id.* at 587 n.59.

Given its interpretation, the D.C. Circuit found that the decision in *R74-1* "flout[ed] the express command of the Act." *Id.* at 590. The Commission's "reliance on cost variability, to the virtual exclusion of other considerations" was deemed "insufficiently responsive to the Act's express concern for extended attribution." *Id.* Its assignment of nonattributed costs on the basis of the noncost factors was likewise rejected by the court. *Id.* at 592. Both in attributing and assigning costs, the D.C. Circuit concluded, the postal agencies failed to heed "the express statutory command that in setting postal rates every reasonable effort must be made to employ cost-of-service principles to the fullest extent possible." *Id.* at 593.[14]

In the next general postal rate case (Docket No. R77-1), the postal agencies, viewing themselves as "bound to follow" *NAGCP I*, sought to "interpret this decision correctly and apply it faithfully." [15] In response to *NAGCP I*'s requirement of "extended attribution," the Commission attributed variable costs on a "longer-run" basis than before. Opinion and Recommended Decision at 10. But it declined to abandon the volume-variability criterion for attribution, because it did "not have reasonable confidence" that a cost was a consequence of providing a particular mail service "unless there is at least some showing of volume variability over the long run." *Id.* at 84.

---

[14] Judge MacKinnon, in a concurring opinion, expressed concern that attributing and assigning "practically all the relevant costs . . . according to an almost absolute cost-of-service straight jacket" would make the noncost factors meaningless. He considered the noncost factors to be as mandatory as the cost factor set forth in § 3622(b)(3). *Id.* at 604, 606.

[15] Opinion and Recommended Decision of the Postal Rate Commission, Docket No. R77-1, at 8-9 (May 12, 1978). *See* Decision of the Governors of the United States Postal Service (May 19, 1978).

With respect to the intermediate or "reasonably assignable" tier required by *NAGCP I*, the Commission stated that if "even an 'inference of causation' is present between a class of service and a functional quantum of costs, we now are required as a matter of law to distribute those costs to that class or service." Opinion and Recommended Decision at 88. To comply with this requirement, the Commission utilized "a concept of 'Service-Related Costs'" under which it considered "certain fixed delivery costs [to be] caused by the preferential classes of mail." *Id.* at 10. Applying this "concept," "preferential" mail classes [16] were assigned the estimated additional costs of providing mail delivery six days a week as compared to a hypothetical three-days-a-week schedule; these costs totalled over $1.2 billion of costs "that would otherwise have been considered residual (institutional)." *Id.* The residual costs remaining after completion of the attribution and assignment processes were allocated according to the noncost factors in § 3622(b).[17]

Although it thus sought to "faithfully apply" *NAGCP I* (*id.* at 76), the Commission stated,

> We would mislead the reader if we left the impression that we regard *NAGCP I* as unquestionably sound and our previous methods as incompatible with the Act. On the contrary, and with all due respect to the court, we believe that the *NAGCP I* ruling was not inevitably required by the statute and has caused us difficulties in its application.
>
> • • •
>
> Of course, we do not intend any departure here from our R76-1 method to imply that we desire to abandon

---

[16] The "preferential" classes were first class and certain second, third, and fourth class mail categories. *Id.* at 95-96.

[17] The Commission ended up attributing costs comprising 64.96% of the Service's total revenue requirement (compared to 59.5% in *R76-1*), assigning 9.58%, and treating 25.46% as residual. *Id.* at 93.

> that method. We continue to believe that the departures required by the court are not required by the Act, and are difficult to implement on economic grounds.

Id. at 9, 75-76.

Similarly, in accepting the Commission's recommended decision, the Governors stated,

> [W]e agree with the Commission's statement that it does not intend its departure in this case from its costing methodology in the previous case to imply a desire to abandon that methodology; and we concur in the Commission's view that the departures required by the Court of Appeals are not required by the Act.

Decision of the Governors of the United States Postal Service, at 4 (May 19, 1978).

The decision in *R77-1* was affirmed by the D.C. Circuit in *NAGCP III*, which reaffirmed the views expressed in *NAGCP I*. The court praised the postal agencies for "depart[ing] from their initial approach to postal ratemaking" and hailed "the constructive interaction between the Postal Service and this court" that it found had developed. 607 F.2d at 404, 396-97. With respect to attribution of costs, the court indicated dissatisfaction with the Commission's continued adherence to volume variability as the basis for attribution. *Id.* at 405-06. But since no party challenged the decision on this point, the court declined to "pass on it," noting that even on the basis of volume variability a sharply increased percentage of total costs had been attributed (*see* p. 12 n. 17, *supra*). *Id.* With respect to the Commission's assignment of "service-related costs"—which was vigorously challenged by a number of parties—the court concluded that this method, "despite the imperfections identified by the parties, represents an acceptable first effort at meeting the strictures of *NAGCP I*." *Id.* at 408.

This Proceeding

The present case, Docket No. R80-1, began on April 21, 1980, when the Service, pursuant to 39 U.S.C. § 3622(a), submitted to the Commission its request for a recommended decision on proposed changes in postal rates and fees. In its filing this time, the Service eliminated use of the "service-related cost" concept from its proposal.

After an extensive evidentiary proceeding, in which Publishers participated as intervenors, the Commission issued its recommended decision on February 19, 1981.[18] It adhered to its "prior determination [in *R77-1*] that we are bound by *NAGCP I* and *III*." *Id.* at 108. Following the "basic costing procedures developed in *R77-1*" (*id.* at 110), the Commission continued to use both short-run and longer-run volume variability as the basis for attributing costs (*id.* at 133-40). The Commission also retained the service-related cost concept which, it stated, *NAGCP III* found to be "an acceptable response to the *NAGCP I* requirement that a significant portion of unattributed costs be reasonably assigned to classes of mail on a cost-of-service basis." *Id.* at 110. The Commission attributed 64.16 percent and assigned 9.44 percent of the Service's total revenue requirement, including $1.8 billion assigned under the service-related cost concept. *Id.* at 110, 222.

The Governors' decision on March 10, 1981[19] found that the rates recommended by the Commission would "not allow the Postal Service to cover its costs and thus to remain self-sufficient as required by law." App. 6b. The Governors challenged, *inter alia*, the Commission's utilization of a service-related cost concept, viewing that concept as "no longer acceptable." App. 7b-8b, 13b. The Governors stated,

---

[18] Opinion and Recommended Decision of Postal Rate Commission, Docket No. R80-1 (Feb. 19, 1981).

[19] Decision of the Governors of the United States Postal Service (March 10, 1981) (App. B to Petition in No. 81-1304, at 1b-129b).

> No one who is informed on postal matters can seriously suppose that the Postal Service would make regular deliveries only three days a week if a few paragraphs concerning priorities were cut out of some internal operating instructions. Yet, without precisely this supposition, the whole "service-related cost" methodology is meaningless. Reasoned decisionmaking cannot tolerate the assignment of over $1.8 billion on the basis of such a transparent fiction.

Id.

The Governors reiterated their continuing disagreement with the D.C. Circuit's construction of the Act in *NAGCP I*. App. 13b-14b. However, in view of the Service's "urgent need for revenues," the Governors decided to allow the Commission's recommended rates to take effect under protest, while returning the recommended decision to the Commission for reconsideration and a further recommended decision. App. 1b.

Petitions for review of the Governors' decision were filed by Publishers and others in the Second Circuit.[20] There, the Postal Service joined in the Publishers' challenge to the D.C. Circuit's interpretation of § 3622(b). The Second Circuit rejected the D.C. Circuit's interpreta-

---

[20] During the course of judicial review in this case, the administrative proceeding continued through two subsequent reconsideration phases in which neither agency altered its position. The Governors, acting pursuant to 39 U.S.C. § 3625(d), modified the Commission's third recommended decision and implemented new modified rates, which largely conformed to the rates proposed by the Service during the course of the administrative proceeding. Decision of the Governors of the United States Postal Service (Sept. 29, 1981). Petitions for review of that third Governors' decision were consolidated in the Second Circuit. Subsequent to this Court's grant of certiorari, the Second Circuit issued its decision in that case. *Time, Inc. v. United States Postal Service*, No. 81-4183 (2d Cir. July 9, 1982). The court generally upheld the Governors' authority to modify but remanded the case to the Governors for further explanation of their specific rate modifications, leaving to them the option of returning the matter to the Commission for a fourth recommended decision.

tion, concluding that it had "failed to give sufficient deference to the agency's own interpretation of the statute," "erroneously supplant[ing] the PRC's 'reasonable' construction of section 3622(b) with its own interpretation." [21]

The court below rejected both the D.C. Circuit's reading of the language of the statute and its view of the legislative history. The Second Circuit disagreed that a "plain reading" of § 3622(b) required either a "three-tier" methodology or the use of "cost-of-service principles" to the maximum extent possible. Section 3622(b), it pointed out, makes all of the enumerated factors mandatory and "places no special emphasis on subdivision (3) other than by inserting the word 'requirement' in that subdivision"—"too tenuous a ground" to support the D.C. Circuit's "expansive interpretation of that provision." 663 F.2d at 1197, App. 21a. *See* pp. 25-26, *infra*. Nor, in the Second Circuit's view, did the legislative history of the section support the D.C. Circuit's interpretation.

> Nothing in the legislative history suggests that Congress meant to impose such rigid rules and standards for rate-setting so as to leave the PRC and Board with only minimal discretionary authority in determining how much of the postal costs a particular rate or fee was to absorb.

Id. at 1198, App. 21a. *See* pp. 26-38, *infra*.

However, since the Second Circuit read § 3622(b) as "'susceptible of a variety of interpretations,'" *id.* at 1200, App. 26a (quoting *American Publishers*, 485 F.2d at 779), it found that "the rates set in accordance with the D.C. Circuit's directives" should not "necessarily be deemed unlawful." *Id.* at 1201, App. 27a-28a. While the court rejected "the extreme position taken by the

---

[21] 663 F.2d 1186, 1197 (2d Cir. 1981). The opinion is reprinted in App. A to the Petition in No. 81-1304, at 1a-48a. *See* App. 19a, 20a.

NAGCP I and *III* Courts," it declined to "hold as a matter of law that the cost allocation methodology used by the PRC in R80-1 was impermissible under section 3622(b)." *Id.* On remand, the court stated, the Commission "may still adhere to the methodology it has employed in R80-1" (*id.*); but it may also, "if it wishes, return to the methodologies used in the first three ratemaking proceedings or develop alternative methodologies which comport with the requirements of section 3622(b), as we interpret it." *Id.* at 1211, App. 48a.

The Second Circuit likewise declined to hold the service-related cost concept unlawful merely because it was developed in response to the D.C. Circuit's erroneous interpretation of § 3622(b). The court recognized that "[t]he Postal Service would never have conjured up the SRC concept to 'assign' certain postal costs had the *NAGCP I* Court not demanded such extensive use of cost-of-service principles in ratemaking." *Id.* at 1201, App. 28a. But the court ruled that use of this concept by the agencies was not impermissible. *Id.* at 1202, App. 31a.[22]

The Second Circuit remanded the proceeding to the Governors for further consideration in light of its opinion. *Id.* at 1211, App. 48a.

SUMMARY OF ARGUMENT

1. The postal agencies' contemporaneous and consistent interpretation of § 3622(b) as providing a two-step method of allocation—with costs to be "attributed" to individual mail categories where a reliable causal nexus is

---

[22] A further important issue before the court involved the Postal Service's revenue requirement. The Commission had reduced that requirement, but the Governors viewed its recommendation as unrealistically low. App. 2b, 7b-8b. The court resolved this inter-agency dispute, holding that the Commission's reduction was "an unlawful encroachment on the policy-making authority" of the Service. 663 F.2d at 1211, App. 48a.

shown and "all other" costs to be "assigned" on the basis of noncost factors—was at the least " 'sufficiently reasonable' to be accepted by a reviewing court." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 102 S. Ct. 38, 46 (1981) (quoting *Train v. Natural Resources Defense Council, Inc.*, 420 U.S. 60, 75 (1975)). Even if not the only one possible, this interpretation is entirely reasonable and was entitled to deference in the courts.

a. The agencies' interpretation is consistent with the language of the statute. Nothing in the words of § 3622 (b) suggests that the agencies may not require reliable proof of causation as a prerequisite to "attribution." And, since the statute is wholly silent on the criteria for "assignment," the agencies' use of the noncost factors, thereby giving substantial weight to those factors, is fully consistent with the statutory language. Congress' use of terms "requirement" and "direct and indirect" in § 3622 (b) does not support the far-fetched construction placed upon them by the D.C. Circuit.

b. The legislative history of § 3622(b) strongly supports the agencies' interpretation.

(i) Subdivision (3) of the section was not derived from the Senate bill, as the D.C. Circuit believed; rather, its origin is found in the House bill and in turn in the report of the Kappel Commission. That Commission recommended a two-step method of allocation: first, a rate floor whereby each mail class would bear the "full added costs demonstrably related to that class"[23] and, second, the apportionment of institutional costs on the basis of value of service and other market factors.

---

[23] *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* 131 (June 1968) ("Kappel Report"). Portions of this report and other relevant legislative history materials are reprinted in the Joint Appendix of Relevant Legislative Material ("Leg. App."). *See* Leg. App. 19.

The Administration's postal reform bill incorporated the Kappel Commission's rate floor proposal, requiring that "at least those costs demonstrably related to" an individual mail class be borne by it. Nontraceable costs would not be allocated by a "rigid formula" but rather on the basis of "current market conditions," the value of the service, and "such market factors as the ability of users to pay and elasticity of demand." *Postal Modernization: Hearings Before the Senate Committee on Post Office and Civil Service*, 91st Cong., 1st Sess. 506 (1969) (testimony of Postmaster General Blount) (*"Senate Postal Modernization Hearings"*), Leg. App. 143. H.R. 17070, the bill that eventually passed the House, contained verbatim the ratemaking provisions of the Administration bill.

(ii) The Senate bill, if anything, was *less* stringent than the House bill in requiring allocation on the basis of cost factors; it did *not* contain an explicit rate floor but *did* list seven noncost "factors" to be considered in setting rates. Only an eighth factor referred to "operating" and "institutional" costs "properly assignable" to each mail class. S. 3842, § 3704(g)(3), Leg. App. 263.

(iii) The conference bill incorporated the Senate bill's noncost factors, but not its cost factor. Instead the House's rate-floor provision was adopted, but in somewhat different language. The term "demonstrably related" costs in the House bill became "direct and indirect costs attributable to" in the final version. The House Managers' Statement attached to the conference report makes clear that the "attribution" provision "establishes a floor for each class of mail" equal to those costs, "both direct and indirect," that vary "in response to changes in volume of a particular class" plus "specific" fixed costs. H.R. Rep. No. 1363, 91st Cong., 2d Sess. 87 (1970), Leg. App. 334. In addition, the House Managers stated, the bill provides for "a judgmental assignment of some part of the remaining costs." *Id.* During the House debates, Representative Udall, a conferee and leading sponsor of the legislation, explained that "[w]e agreed that the principle of the

House bill be included in the final version of the legislation. This would establish a 'floor' for each class of mail equal to costs called 'demonstrably related costs' in the House version and 'attributable costs' in the final version. . . . The [Conference] Committee felt that such costs were capable of objective determination and proof either by empirical observation or deductive analysis." 116 Cong. Rec. 27,606 (1970), Leg. App. 365. Nothing in the legislative history contradicts this explanation.

c. Actions of Congress subsequent to the Act's passage buttress the agencies' interpretation. These include the enactment in 1976 of an additional noncost criterion (Pub. L. No. 94-421, § 10, 90 Stat. 1311) and the rejection in 1975 and 1978 of amendments that would have mandated the same "extended" use of "cost-of-service principles" that the D.C. Circuit required.

d. The agencies' interpretation is consistent with Congress' policy goals under the Act. Their interpretation furthers Congress' goal that the postal system be run in a more business-like manner, with substantial weight in ratesetting to be given to market factors.

The arguments of the D.C. Circuit and the petitioners misconceive the manner in which Congress sought to achieve its policy objectives. Although it unquestionably intended to "get politics out of the Post Office," Congress did so by including a wide variety of provisions in the Act—not least the elimination of Congress' role in ratemaking and the assignment of that task to independent agencies. None of these provisions curtailed the agencies' discretion in the allocation of costs. The argument that reliance on noncost factors unfairly "discriminates" against first class mailers and "cross-subsidizes" other mailers also is unfounded. Nor is there anything "objective," as petitioners urge, about a system that uses "cost-of-service principles" to allocate costs in the absence of a reliable causal connection.

2. Other issues dealt with by the court below, such as the validity of the Commission's "service-related cost" concept, need not and, we submit, should not be decided by the Court at this time, because they derive from the D.C. Circuit's erroneous interpretation of the Act and must be addressed again by the agencies under a corrected legal standard. *See NLRB v. International Longshoremen's Association*, 447 U.S. 490, 511 (1980).

ARGUMENT

I. THE POSTAL AGENCIES' CONSISTENT INTERPRETATION OF SECTION 3622(b), BEFORE THE D.C. CIRCUIT INTERVENED, IS REASONABLE AND ENTITLED TO ACCEPTANCE BY THE COURTS.

Before the D.C. Circuit "decided to take a more active role," as the court below put it, the Commission and the Postal Service "were in agreement as to the meaning of section 3622(b)." 663 F.2d at 1193, App. 13a. Both agencies "read the provision to require a two-step process for allocating postal costs." *Id.*, App. 12a. The first step was to "attribute" to individual mail categories those costs shown by evidence of volume variability to be caused by a specific category. The second step was to "assign" to the various mail categories the remaining or "institutional" costs on a judgmental basis using the non-cost factors listed in § 3622(b). This interpretation, as the Second Circuit held, was a reasonable one, entitled to acceptance by a reviewing court. It should not have been "supplanted" by the D.C. Circuit's interpretation.

This Court has stated in oft-quoted language,

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have

> reached had the question arisen in the first instance in judicial proceedings."

Udall v. Tallman, 380 U.S. 1, 16 (1965) (quoting *Unemployment Commission of Territory of Alaska v. Aragon*, 329 U.S. 143, 153 (1946)). *Accord Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

Only this Term, the Court again considered the extent to which deference should properly be given to an agency's construction of a statute administered by it. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 102 S. Ct. 38 (1981). It held that unless an agency's interpretation was clearly "inconsistent with the statutory mandate or . . . frustrate[d] the policy that Congress sought to implement," the role of a court of appeals was "not to interpret the statute as it thought best but rather the narrower inquiry into whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Id.* at 42, 46 (quoting *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 75 (1975)). *See Zenith Radio Corp. v. United States*, 437 U.S. at 450. "To satisfy this standard," the Court stated, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Democratic Senatorial Campaign Committee*, 102 S. Ct. at 46.

The "sufficiently reasonable" standard is clearly satisfied here. The postal agencies' construction of § 3622(b) was neither "inconsistent with the statutory mandate" nor did it "frustrate the policy" Congress sought to implement—quite the contrary, as the Second Circuit held and as we show below (pp. 24-46, *infra*). At the least, § 3622(b), like the statute at issue in *Democratic Senatorial Campaign Committee*, is capable of more than one reasonable construction. The conflict here between two courts of appeals "rather strongly indicates that the question does not admit of an easy answer." *Train v. Natural Re-*

sources Defense Council, Inc., 421 U.S. at 75. The agencies' interpretation, even if arguably not the only one possible, was plainly a reasonable one.[24]

That the postal agencies adopted their interpretation immediately after the Act became law, moreover, entitles their interpretation to "considerable weight." *Zenith Radio Corp. v. United States*, 437 U.S. at 450.

> [A]n administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

Id. (quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933)).

The D.C. Circuit thus acted improperly when it substituted its own interpretation for an agency interpretation that was "far from unreasonable." *Zenith Radio Corp. v. United States*, 437 U.S. at 451. It plainly failed, as the Second Circuit held, to give "sufficient deference" to the agencies' interpretation (663 F.2d at 1196, App. 19a), seeking instead to exercise a prerogative not granted it either by Congress or under decisions of this Court. *Cf.*

---

[24] Like the Federal Election Commission in *Democratic Senatorial Campaign Committee*, the postal agencies are "precisely the type of agenc[ies] to which deference should presumptively be afforded." 102 S. Ct. at 45. The Postal Service has been given primary responsibility for administering the Act (39 U.S.C. §§ 101, 401, 403, 3621); it has broad rulemaking authority (39 U.S.C. § 401(2)); the Governors' membership is bipartisan in a politically-charged area (39 U.S.C. § 202(a)); judicial review of the Governors' rate decisions is subject to the stringent limitations of 5 U.S.C. § 706 (39 U.S.C. § 3628); and a reviewing court is forbidden either to suspend *pendente lite* or to modify a Governors' rate decision (*id.*). The Commission also has important responsibilities in administering the Act (39 U.S.C. §§ 3622-3624), possesses significant rulemaking authority (39 U.S.C. § 3603), and has a bipartisan membership (39 U.S.C. § 3601).

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).[25]

A. The Agencies' Interpretation Is Fully Consistent with the Language of Section 3622(b).

Contrary to the D.C. Circuit's view, a "plain reading" of the language of § 3622(b)(3) does *not* show that Congress required the postal agencies to employ a "three-tier" methodology or to use "cost-of-service principles" to the maximum extent possible. The agencies' differing interpretation, if anything, is more fully consistent with the words of the statute.

A "plain reading" shows that subdivision (3) is only one of eight (now nine) "factors" that Congress specifically required the Commission to consider. The agencies' view, but not the D.C. Circuit's, gives adequate weight to the other "factors."[26] *See* pp. 41-42, 46, *infra*.

Even focusing solely on subdivision (3), there is no language suggesting that the Commission may not require reliable proof of causation as a prerequisite to attribution. Nor is there language requiring that cost attributions extend beyond volume variability analysis which, as the Commission found, is the most reliable indi-

---

[25] The suggestion of United Parcel Service ("UPS") and Direct Mail/Marketing Association ("DMMA") that deference is due to the Commission, but not the Governors, is groundless. *See* UPS Br. 32; DMMA Br. 31. Under the Act the Governors have the ultimate responsibility for the establishment of fair and equitable rates, and it is *their* decisions that are reviewed by the courts. *See* pp. 3-4 & n.1, *supra*. Here, in any event, both postal agencies agreed, prior to *NAGCP I*, that Congress intended postal costs to be divided into two categories—"attributable" costs and "all other costs"—and both agree that volume variability is the primary test of cost causation for purposes of "attribution."

[26] "To make the seven discretionary standards meaningful Congress must have intended that there be some substantial volume of costs that are available for assignment." *NAGCP I*, 569 F.2d at 604 (MacKinnon, J., concurring).

cator of causation. Opinion and Recommended Decision, Docket No. R80-1, at 139.

That both "direct and indirect" costs are made attributable under the statute is by no means inconsistent with the agencies' interpretation, as the D.C. Circuit believed. *NAGCP I*, 569 F.2d at 585, 586; *see also* UPS Br. 13, 16. Certain "indirect" costs vary with volume and are therefore attributable. *See* Opinion and Recommended Decision, Docket No. R74-1, at 101; p. 8 & n. 10, *supra*. There is no reason to believe that Congress intended to require some other and much broader meaning to be given to the word "indirect."

Nor does the language of the "reasonably assignable" provision mandate assignment on the basis of "cost-of-service principles," as the D.C. Circuit held. Rather, the provision is wholly silent on the criteria for assignment. The agencies' construction, which utilizes the noncost factors in making assignments, is thus entirely consistent with the words of the statute.

In reaching its conclusion, the D.C. Circuit placed great weight on the use of the word "requirement" in subdivision (3), as do the petitioners here. *NAGCP I*, 569 F.2d at 595; *see* National Association of Greeting Card Publishers ("NAGCP") Br. 17; UPS Br. 22-34. But, as the Second Circuit pointed out, all the "factors" in § 3622(b) are introduced with the mandatory "shall" and thus are as much "requirements" as subdivision (3). 663 F.2d at 1197, App. 21a.[27] If anything, Congress' placement of subdivision (3) in the middle of the list, rather than at the top, does not square with the overriding impor-

---

[27] Similarly, Judge MacKinnon pointed out that "[t]he word 'shall' at the forepart of section 3622 is just as mandatory as the word 'requirement,' in the same section, if not more so, since it applies to the entire section—but the Per Curiam opinion overemphasizes the latter and refuses to recognize the former." *NAGCP I*, 569 F.2d at 606 (concurring opinion).

tance that the D.C. Circuit ascribed to the provision. 663 F.2d at 1197, App. 21a. In any event, the agencies' interpretation *does* give special weight to subdivision (3), for it makes attribution the initial step. Only after that process is completed (and a sizable portion of the Service's costs allocated) are the remaining costs assigned on the basis of the other statutory factors. Plainly, no more can be inferred from the mere use of the word "requirement"—a word which, *inter alia*, connotes nothing about the extent of cost tracing.

B. The Legislative History of Section 3622(b) Supports the Agencies' Construction.

The agencies' interpretation is firmly grounded in the legislative history of the statute. It is the D.C. Circuit, as the court below found, which "misconstrued the legislative history" of § 3622(b). 663 F.2d at 1196, App. 19a.

Importantly, the D.C. Circuit mistakenly believed that subdivision (3) derived from the Senate, not the House, bill. The D.C. Circuit read the Senate bill as stricter on costing and as intending reliance on cost-of-service principles. The court believed that the Senate prevailed in the conference, and that the bill was strengthened, thus requiring even greater reliance on cost-of-service principles. *NAGCP I*, 569 F.2d at 588-89. While the Senate bill contributed the *noncost* "factors" to § 3622(b), the source of subdivision (3) was in fact the House bill, and in turn the report of the President's Commission on Postal Organization ("the Kappel Commission"),[28] which the D.C. Circuit simply ignored. The legislative history flatly negates the D.C. Circuit's "three-tier" approach and demonstrates that the "attribution" provision, as the agencies concluded, was intended to create a rate floor for each mail category based on variable costs.

---

[28] President Johnson established the Commission in April 1967 to consider proposals to reorganize the Post Office Department.

1. *The Kappel Commission Report*

The postal reform legislation in both Houses was substantially influenced by the work of the Kappel Commission. *See, e.g.*, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 6 (1970), Leg. App. 270; S. Rep. No. 912, 91st Cong., 2d Sess. 2 (1970), Leg. App. 295. That Commission proposed a basic restructuring of the U.S. postal system, with the elimination of the Post Office Department as an executive department and its replacement by an independent government-owned corporation, which would introduce "modern management practices." Kappel Report at iii, Leg. App. 2.

The Kappel Commission was sharply critical of the existing method of establishing mail rates, which it characterized as "disturbing in its irrationality." *Id.* at 29, Leg. App. 3. In particular, its Report criticized the Post Office's longstanding "fully-allocated" Cost Ascertainment System "through which every postal expense is charged to some class of mail or special service." [29] *Id.* at 30, Leg. App. 4. It found that

> [a] large segment of postal costs . . . result [not] from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to achieve fairness, is not only arbitrary but uninformative.

Id.[30] One adverse consequence of "rigidly apportioning all postal costs," the Report stated, was that " 'intangible'

---

[29] This method of allocation to individual mail categories on the basis of cost accounting formulae and "cost-of-service principles" is similar to the costing methodology required by *NAGCP I* and *III*.

[30] The Report added, "We do not believe that *any* fully-allocated system is appropriate for rate-making. Full-cost allocation blurs the critical distinction between variable and fixed costs and makes it impossible to determine whether a particular class pays its true cost." *Id.* at 133, Leg. App. 21 (emphasis in original).

factors," such as "value of the service to the user," were "consciously ignor[ed]." *Id.* at 31, Leg. App. 5. "Pricing practices of many corporations (including utilities)," it noted, "have moved away from reliance on such rigid accounting allocations and now take service and market considerations as well as cost into account." *Id.*

The Kappel Commission recommended that "Congress establish broad policy criteria for setting postal rates under which rates for a given class of mail would cover the *costs demonstrably related* to that class of service." *Id.* at 61, Leg. App. 6 (emphasis added).[31] It explained,

> Revenues from each class must cover the full additional costs of providing the service . . . . Remaining institutional costs would not be apportioned to the several classes of mail by rigid accounting formulas. Rather, for pricing purposes management would apportion these costs to the various classes on the basis of its judgment of such market factors as differences in the nature of the services provided and differing demand characteristics.

Id. at 61-62, Leg. App. 6-7.[32]

2. *The House Bills (H.R. 11750, H.R. 17070)*

The Kappel Commission's ratemaking recommendations were incorporated in the Administration's postal reform bill, H.R. 11750, 91st Cong., 1st Sess. (1969), Leg. App.

---

[31] The Kappel Commission noted that "[c]ertain capital costs may be directly attributable to a specific mail class, *e.g.*, a parcel sorter . . . ." *Id.* at 131 n.*, Leg. App. 19. This category of costs was later called "specific fixed" costs by the Post Office Department in its definition of "demonstrably related costs." *Postal Rates and Revenue and Cost Analysis: Hearings Before the House Subcomm. on Postal Rates*, 91st Cong., 2d Sess. 75 (1970) ("*House Postal Rates Hearings*"), Leg. App. 130. This category, as Assistant Postmaster General Hargrove explained, is quite narrow. *Id.* at 3, Leg. App. 120.

[32] The Report estimated the "pool of institutional costs [to] represent between 40% and 50% of total postal costs." *Id.*

214.[33] The ratemaking section, adopting the rate floor proposal of the Kappel Commission, provided that "at least those *costs demonstrably related* to the class of service in question will be borne by each such class and not by other classes of users or by the mails generally." *Id.* § 1201(c), Leg. App. 216 (emphasis added).

Postmaster General Blount explained the ratemaking provisions of H.R. 11750 in testimony before the Senate Committee:

> Except for free and reduced-rate mail, no postage rate would be set at a level below demonstrably related costs for the particular class or subclass involved. This provides a floor upon which a rate can be built to recover not only the demonstrably related costs but also an appropriate amount of the remaining costs, not traceable to any one service. The proposed legislation does not establish a rigid formula specifying how such allocation of nontraceable costs shall be made, although undue discrimination and preferences are expressly prohibited and all rates are required to be fair and reasonable. The determination as to how nontraceable costs shall be allocated can be made in the light of current economic conditions, and will depend upon the type, value, and quality of service rendered, and such market factors as the ability of users to pay and elasticity of demand. The Kappel Commission made an important contribution to the rationality of the ratemaking process when it pointed out the shortcomings of the present cost ascertainment system, under which all costs, direct and indirect, are arbitrarily prorated among the several classes of mail without taking into account the differences in service and the differences in market conditions affecting the various classes.

Senate Postal Modernization Hearings at 506, Leg. App. 143. He announced that "[a] supplemental accounting

---

[33] The bill was introduced by Representative Udall, a leading member of the House Committee on Post Office and Civil Service, on behalf of himself and twelve other Congressmen.

system needed to determine the costs demonstrably related to each class of mail was being designed . . . ." *Id.*

The new cost accounting system, called "Revenue and Cost Analysis," computed two types of costs: "demonstrably related" costs and "institutional" costs, each amounting to about 50 percent of total postal costs. *House Postal Rates Hearings* at 60, 75. "Demonstrably related costs" were defined as

> [t]hose costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of a particular class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service.

Id. at 75, Leg. App. 130. "Institutional" costs were defined as "the total costs of the postal service, less demonstrably related costs." *Id.*

H.R. 17070, the bill that eventually passed the House, contained verbatim the ratemaking provisions of H.R. 11750.[34] "Demonstrably related" costs were made the rate floor for each mail class. *Id.* § 1201(c), Leg. App. 220.[35] Other provisions in the bill took "the Post Office Department completely out of the President's Cabinet and out of politics and recast . . . it in the form of an independent establishment within the executive branch of the Government, to be known as the United States Postal Service." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 6 (1970), Leg. App. 270. In the exercise of its ratemaking functions, the Service was to be assisted by an expert Postal Rate Board (H.R. 17070, §§ 1251 *et seq.*, Leg. App. 225-35), but the Service's rate decisions were made subject to a Congressional veto (*id.* § 1254, Leg. App. 232).

---

[34] H.R. 17070, 91st Cong., 2d Sess. § 1201 (1970), Leg. App. 219-22. The bill was sponsored, *inter alia*, by Representative Dulski, chairman of the House Committee, and Representative Udall.

[35] Section 1202 of the bill excepted all the categories of free and reduced-rate mail from this rate floor and carried them forward at the then-existing rates. Leg. App. 222-25.

3. *The Senate Bill (S. 3842)*

S. 3842, the bill that passed the Senate, also established an independent Postal Service outside of the President's Cabinet and created an expert Postal Rate Commission to conduct rate hearings and provide recommended decisions to the Governors. S. 3842, 91st Cong., 2d Sess., §§ 301, 3702 (1970). Unlike the House bill, however, the Senate bill contained no provision for a Congressional veto.[36]

The ratemaking criteria to be applied by the Commission were set forth in greater detail in S. 3842 than in the House bill. S. 3842, § 3704(g), Leg. App. 262-64. The Senate bill listed eight factors to be considered in setting rates. Seven of these were noncost factors similar to the criteria that Postmaster General Blount testified in the Senate hearings should be used in allocating institutional costs (*see* p. 29, *supra*). Only the eighth "factor" (in third place on the list) referred to costs, namely, "operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service." *Id.* § 3704 (g) (3), Leg. App. 263. All of the listed factors, the Senate Report emphasized, were required to be taken into account. S. Rep. No. 912, 91st Cong., 2d Sess. 14, 15, 17 (1970), Leg. App. 307-08, 310.

The Senate bill was thus, if anything, *less* stringent than the House bill in requiring allocation on the basis of cost factors: it did *not* contain an explicit rate floor but *did* contain a full list of noncost factors.[37] Neither bill

---

[36] Except for certain mail sent free of postage, S. 3842 eliminated rate preferences for previously preferred categories (churches, unions, charitable and fraternal organizations, etc.) and made them subject to the same standards applicable to other rate categories. *Id.* § 3704(g), Leg. App. 262-64. The bill, however, provided that the higher rates established for the previously preferred categories would be phased in over a period of ten years. *Id.* § 3704(i).

[37] During the floor debates on the Senate Committee bill, Senators Bellmon and Fannin, two members of the Committee, emphasized the weakness of the Senate bill's costing language and urged (un-

contained the slightest hint of the "three-tier" methodology that the D.C. Circuit later held was mandated.

Like the House, the Senate made clear its opposition to the fully-allocated cost system previously used by the Post Office Department and its support for an incremental cost approach. The Senate Committee, responding to a UPS proposal to require parcel post rates to recover their fully-allocated costs, stated,

> The committee rejects the suggestion on the principle that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its cost *beyond its incremental costs.*

S. Rep. No. 912, at 17, Leg. App. 310 (emphasis added).

4. ***The Conference Bill***

The conference bill followed the Senate version by eliminating any Congressional veto power over rate decisions, —thereby, even more fully than the House bill, "getting the Post Office out of politics." The ratemaking provisions of the House and Senate bills were blended together. All of the Senate bill's noncost factors were adopted, but its cost factor was not. Instead, the House's rate-floor provision was adopted, but in the somewhat different language of § 3622(b)(3). "Demonstrably related" costs in the House bill became "direct and indirect costs attributable to" in the final version,[38] and was accompanied by

---

successfully) that the House's minimum rate floor be adopted. Senator Bellmon criticized the Senate bill because it "fails to require" that each class at least "pay its demonstrably related costs . . . ." 116 Cong. Rec. 22,051 (1970). Similarly, Senator Fannin noted that a "critical defect in S. 3842 is its failure to include a minimum floor on postal rates." *Id.* at 22,053, Leg. App. 355. He supported the House's "demonstrably related" cost language because it provided at least an "incremental costs" rate floor. *Id.*

[38] Contrary to the petitioners' view, the addition of the words "direct and indirect" in conference did not represent any expan-

the "reasonably assignable" provision applicable to "all other costs." [39]

Contrary to the views of the D.C. Circuit and the petitioners, the Senate and House did not disagree on the issue of costing methodology, with the Senate taking a "harder line" on cost tracing and ultimately prevailing. Although the two Houses did disagree on a number of other issues—such as union shops and the treatment of preferred mail categories—there was no substantial disagreement on the question of costing methodology. *Both* rejected fully-allocated costing techniques in favor of incremental costing. *Both* favored the allocation of institutional costs on the basis of noncost factors, such as value of service. The principal difference was that the Senate bill specifically enumerated the noncost factors, while the House bill did not. And *neither* House, either before or after the conference, said anything suggesting a "three-tier" costing methodology.

Had § 3622(b)(3) been the subject of as much dispute in conference as petitioners imply—and had the Senate conferees "prevailed" in a major victory—then the dispute and its favorable resolution surely would have been highlighted by the Senate conferees in the subsequent Senate

---

sion of the House's "demonstrably related" cost concept, but was merely a codification of the Post Office Department's own definition of demonstrably related costs as "those costs, *direct or indirect*, which by empirical or deductive analysis can be demonstrated . . . to vary in response to changes in volume . . . ." *House Postal Rates Hearings* at 75, Leg. App. 130 (emphasis added). Similarly, the change from "demonstrably related" to "attributable" costs did not represent a rejection of the concept as used in the House bill (see pp. 34-37 & n.43, *infra*).

[39] The conference bill contained a ten-year phasing-in period for the preferred rate categories and established an "attributable cost" rate ceiling for those categories—i.e., the preferred rate categories were exempted from bearing any of the fixed, or institutional, costs of the Postal Service. 39 U.S.C. § 3626(a)(1).

floor debates. Instead, the Senate debates are silent on the subject.[40]

Given the Senate's silence, the explanations of conference action by the House conferees take on special significance. The Statement of the House Managers, printed as part of the Conference Report, explained that the Conference Committee, while nominally adopting the Senate provision, included in § 3622(b)(3) a rate floor identical to that in the House bill.

> The conference substitute adopts the Senate provision with an amendment which incorporates the standard that each class of mail or type of mail service should bear the direct and indirect postal costs attributable to that class or type plus that portion of other costs of the postal service reasonably assignable to such class or type.
>
> The provision in the conference substitute with respect to costs attributable to a class of mail or type or service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.

H.R. Rep. No. 1363 at 87, Leg. App. 334. Nothing in the legislative history casts the slightest doubt on the reliability of the House Managers' explanation.[41]

---

[40] For example, Senator McGee, the Committee chairman and lead Senate conferee, described the "major" disputed issues in the conference but never mentioned costing methodology. 116 Cong. Rec. 26,953 (1970), Leg. App. 357.

[41] Contrary to petitioners' position (UPS Br. 34; NAGCP Br. 26), the fact that the House Managers' Statement was published after the Senate had adopted the conference bill does not affect in the least its reliability as an indicator of Congressional intent. The Statement and the ensuing House floor debates on the confer-

The House debate on the conference report reaffirms the House Managers' view. Representative Udall, a conferee and a leading sponsor of the legislation, gave a full explanation of the changes to § 3622(b)(3) made in conference, as follows:

> In order to guarantee that these charges would be based on fair and equitable standards for each class of mail, be it for the ordinary citizen or for the big commercial mailer, we insisted that each would pay at least the "demonstrably related costs."
>
> This phrase, while finally deleted in the final bill, was used throughout the conference to express the feeling that each class of mail pay those direct or indirect costs attributable to it.
>
> We agreed that the principle of the House bill be included in the final version of the legislation. This would establish a "floor" for each class of mail equal

---

ence bill remain the *only* explanations of the costing provisions as reported out of conference.

Petitioners' reliance on cases like *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), and *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975), is misplaced. Those cases involved interpretation of the Freedom of Information Act, which originated in and passed the Senate, and then passed the House unanimously without amendment, thus obviating the need for a conference. Although the identical bill passed both Houses, the Senate and House issued sharply conflicting reports on the bill, and the court had to decide which of two conflicting reports best reflected Congressional intent. It concluded that

> [s]ince only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent *when the two reports conflict.*

Soucie v. David, 448 F.2d at 1077 n.39 (emphasis added). *See also Vaughn v. Rosen*, 523 F.2d at 1140-42. Where (as here) no conflict exists, the courts have given full weight to reports and statements of the House which acted last on the legislation. *See, e.g., Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544, 547 (2d Cir. 1978); *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980).

> to costs called "demonstrably related costs" in the House version and "attributable costs" in the final version. Such costs consist of those costs, both direct and indirect, which vary over the short term in response to changes in volume of a particular class or which, even though fixed rather than variable, are the consequence of providing the specific class or service involved. The committee felt that such costs were capable of objective determination and proof either by empirical observation or deductive analysis. In addition to this threshold requirement, the legislation provides for a judgmental assignment of some part of the remaining costs. The judgment as to what portion of institutional costs should be borne by each class is to be made in the light of the criteria in the bill.
>
> I have dwelt at length on this section because I believe it goes to the heart of what we are trying to do by giving management some responsibility and prerogatives.

116 Cong. Rec. 27,606 (1970), Leg. App. 365.[42] Representative Derwinski, also a conferee, likewise equated "attributable costs" in the conference bill with "demonstrably

---

[42] Petitioner UPS argues that the reference in both the House Managers' and Udall statements to a "judgmental assignment of *some part* of the remaining costs" implies the existence of a "third tier" of costs consisting of the "other part" of the remaining costs. UPS Br. 37. The House Managers and Representative Udall, however, were plainly referring to assignment of "some part" of the unattributed costs *to each mail category*. As Representative Udall's explanation makes clear, the "judgmental assignment" refers to the "judgment as to what portion of *institutional* costs should be borne *by each class* . . . ." 116 Cong. Rec. 27,606, Leg. App. 365 (emphasis added). After "some part" of the remaining institutional costs has been assigned to each class, there is no "other part" left. The absence of any discussion as to this supposed "other part" in either the House Managers' or Udall statements confirms that Congress intended no "other part."

related costs" in the House bill.[43] *Id.* at 27,602, Leg. App. 361.[44]

The Second Circuit accurately summarized the legislative history:

> Thus, section 3622(b), as enacted, represents a combination of (1) the common *primary* factor between

---

[43] During the Senate hearings, various witnesses had complained that the term "demonstrably related" was too vague and suggested that the term be defined more specifically. *See Senate Postal Modernization Hearings* at 561-62, 568, Leg. App. 156-57, 158 (statements of John Daly and Louis Kislik, DMAA); 596-97, Leg. App. 162-63 (statement of former Postmaster General J. Edward Day).

[44] Petitioners' emphasis on the reference to "short-run" volume variable costs in the House Managers and Udall statements misses the point. The key element in Congress' concept of "attribution" is not short-run versus longer-run, but the limitation to costs which can be shown by "objective determination and proof" to be caused by a category of mail. As Representative Udall stated, this principle formed the basis for the choice of short-run volume variability as the most reliable measure of attributable costs. 116 Cong. Rec. 27,606, Leg. App. 365.

The distinction between short- versus longer-run costs, moreover, is largely one of semantics. The Foster Associates study, which became part of the Kappel Report, adopted long-run costs as the ratemaking standard, but defined "long run" as the period of time during which the rates are expected to remain in effect. *See* Foster Associates Study, Annex II to the Kappel Report, at 3-32 (June 1968), Leg. App. 48. That definition of "long run" is fully compatible with the reference to "short-run" costs in the House Managers' Statement.

There is no fixed time distinction between short- and long-run, and there may be any number of different "short-run" time periods appropriate for a particular industry. R. Leftwich, *The Price System and Resource Allocation* 196-97 (7th ed. 1979). *See also* D. Watson, *Price Theory and Its Uses* 189-90 (2d ed. 1968). The "longer-run" analysis currently used by the Commission is, more precisely, a "short-run" analysis which extends beyond a one-year time period. Thus, there is no conflict between the "short-run" analysis mentioned in the House Managers' Statement and the "longer-run" analysis used by the Commission.

> the House and Senate bills that rates be established on a fair and equitable basis, (2) the non-cost factors provided in the Senate bill and (3) the rate floor provided by the House bill. The Conference Committee report quoted above makes it clear beyond cavil that the "direct and indirect costs attributable" language was intended to provide a rate floor just as was the "demonstrably related" language in the House bill. The additional language in section 3622 (b) (3) that each class of mail is to bear "that portion of all other costs . . . reasonably assignable to such class" is explained in the Committee report as providing for a "judgmental assignment of some part of the remaining costs."

663 F.2d at 1200, App. 25a-26a.

The agencies' interpretation is thus entirely consistent with the legislative history. The "attributable costs" portion of § 3622(b) (3) is derived from the provision in the House bill which established a rate floor based on variable costs. And, by requiring reliable evidence of causation, the agencies carried out Congress' intent that "attributable costs" must be (in Representative Udall's words) "capable of objective determination and proof either by empirical observation or deductive analysis." The intent of the "reasonably assignable" provision—to allow "judgmental assignment" of institutional costs—is satisfied by the agencies' use of the noncost criteria. Indeed, given the legislative history, a failure by the agencies to give substantial weight to the noncost factors would have flouted Congress' intent.

C. The Agencies' Interpretation Is Consistent with Subsequent Actions of Congress.

Although neither Congressional inaction [45] nor the actions of Congress subsequent to enactment of legislation

---

[45] As stated in *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969),

> Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in

are as probative of legislative intent as are its concurrent actions, Congress has nevertheless given clear indication since 1970 that the agencies' interpretation of the Act is correct.

In 1976, prompted by its concern that the Commission had given insufficient consideration to the noncost criteria in setting postal rates, Congress added a new noncost criterion—the "educational, cultural, scientific, and informational value to the recipient of mail matter."[46] That amendment, enacted prior to the *NAGCP I* decision, also reflected concern as to the emphasis on "extended attribution" in Chief Judge Bazelon's concurring opinion in *American Publishers*.[47]

Moreover, Congress in 1975 rejected an amendment to § 3622(b)(3) that would have required allocation of costs using the same kind of "cost-of-service principles" the *NAGCP I* court subsequently read into the Act.[48] When the identical amendment was offered again in 1978, it was again defeated.[49]

Congress' disagreement with the *NAGCP I* interpretation is also reflected in the legislative history of the unsuccessful 1978 amendments to the Act, cited by petitioner UPS (Br. 39). In response to recommendations of the Commission on Postal Service,[50] the House Committee in

---

Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946).

See also United States v. Price, 361 U.S. 304, 310-11 (1960); *Jones v. Liberty Glass Co.*, 332 U.S. 524, 533 (1947); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976).

[46] 39 U.S.C. § 3622(b)(8), *as added by* Pub. L. No. 94-421, § 10, 90 Stat. 1311.

[47] *See* statement of Rep. Ford in the House floor debates on the Conference Report, 122 Cong. Rec. 29,747-48 (1976), Leg. App. 375-76.

[48] *See* 121 Cong. Rec. 30,777-84 (1975), Leg. App. 367-74.

[49] *See* 124 Cong. Rec. 8857-62 (1978), Leg. App. 455-60.

[50] The Commission on Postal Service was a special commission established by Congress in 1976 to study and make comprehensive

1977 strongly criticized the D.C. Circuit's view in *NAGCP I* that § 3622(b) requires maximization of cost attribution. H.R. Rep. No. 808, 95th Cong., 1st Sess. 9 (1977), Leg. App. 414. The House bill, defining "attributable" costs as volume-variable costs, passed the full House overwhelmingly. The Senate Committee likewise criticized *NAGCP I:*

> The court's opinion has impelled a steady increase in the percentage of total costs either "attributed" to specific classes or subclasses of mail or "assigned" to them on an arbitrary basis by using accounting principles instead of volumetric evidence of cost causality . . . . In effect, 74.5 percent of costs are, for those classes or subclasses of mail, distributed, in part, on little or no evidence of cost causality, and in disregard of the price impact on the users of those classes and subclasses.

S. Rep. No. 1191, 95th Cong., 2d Sess. 6 (1978), Leg. App. 448. To "clarify the congressional intent," the Committee adopted a ceiling on attributable costs. *Id.*

Thus, both the House and Senate Committees concurred that the *NAGCP I* interpretation of § 3622(b) was contrary to Congressional intent. Both committees proposed legislation to reaffirm the original Congressional intent. Although that legislation was adopted by the House, it was reported by the Senate Governmental Affairs Committee too late to be acted upon by the full Senate. The failure of the Senate to act, however, was totally unrelated to the merits of the § 3622 amendments.[81]

---

recommendations on virtually all aspects of the postal system. It recommended (1) a reaffirmation of Congressional intent that volume variability was the keystone of cost attribution and (2) a 60% cap on attributable costs. 1 *Report of the Commission on Postal Service* 62-64 (April 1977), Leg. App. 385-87.

[81] Because the bill, H.R. 7700, included several unrelated provisions affecting Congressional appropriations, its consideration required a waiver from the Senate Budget Committee. That Committee, however, declined to recommend a waiver, thus killing the bill. *See*

D. The Agencies' Interpretation Accords Fully with Congress' Policy Goals Under the Act.

Contrary to the views of the D.C. Circuit and petitioners, the agencies' interpretation of § 3622(b) is fully consistent with Congressional policy goals under the Act.

The Postal Reorganization Act was, of course, intended to achieve a number of policy objectives. The D.C. Circuit and the petitioners focus selectively on a few of those objectives—such as "getting politics out of the Post Office" and avoiding "discrimination" against various mail categories—while misconceiving the means by which Congress sought to achieve those objectives. Moreover, they ignore totally a fundamental policy objective of the Act: that the postal system be run in a more business-like manner.

This latter objective formed the cornerstone of the Kappel Commission's recommendations to Congress.

> Although the Post Office is one of the nation's largest businesses, it is not *run* as a business but as a Cabinet agency of the United States Government.

Kappel Report at 1 (emphasis in original). The Kappel Commission proposed to cure this deficiency in the rate-making area by abandoning the use of fully-allocated costing and giving greater weight to market factors (*see* pp. 27-28, *supra*).

The legislative history shows clearly that Congress was persuaded that the Post Office should be run in a more business-like manner, with institutional costs allocated on the basis of "current economic conditions" and "such market factors as the ability of users to pay and elasticity of demand." [52] Congress acted on that belief by including the noncost market criteria in § 3622(b).

S. Rep. No. 1244, 95th Cong., 2d Sess. 1, 3 (1978), Leg. App. 462, 464. At no point did the Budget Committee or the Senate express any disagreement with the conclusions of the House and the Senate Governmental Affairs Committee that *NAGCP I* misconstrued Congressional intent.

[52] Testimony of Postmaster General Blount, *Senate Postal Modernization Hearings* at 506, Leg. App. 143.

The agencies' construction, which gives substantial weight to value of service and other "pricing" factors, is thus fully consistent with Congress' goal of making the postal system more business-like. By contrast, the D.C. Circuit and the petitioners, which denigrate the noncost factors and seek to deny them substantial effect, take a position at odds with Congressional goals.

1. *The "Getting Politics Out of the Post Office" Argument*

The D.C. Circuit correctly stated in *NAGCP I* that "a central and express aim of both Houses of Congress" was "to get 'politics out of the Post Office.'" 569 F.2d at 588 (quoting H.R. Rep. No. 1104, at 6, Leg. App. 270, discussing the old political patronage system). From that premise, the court leaped to the conclusion that "[a] major thrust of the postal reform effort therefore was to minimize th[e] attraction of lobbyist influence by severely curtailing the broad discretion that had characterized prior ratesetting procedures and served to shield abuses of the system." *Id.* This conclusion is unfounded.

Although Congress unquestionably intended to get "politics out of the Post Office," it did so by including a variety of provisions in the Act, none of which curtailed the agencies' discretion to allocate costs. The most important of these involved administration of the Postal Service.[53] In the ratemaking area, the objective of depoliticizing the Service was accomplished by (1) transferring the power to set rates from Congress to the independent postal agencies (39 U.S.C. § 404 and Chapter 36); (2) requiring

---

[53] These included (1) the removal of the Post Office Department from the President's Cabinet and its establishment as an independent agency (39 U.S.C. § 201); (2) the requirement that the Governors and the Commission have bipartisan memberships with fixed terms of office, and be removable only for cause (39 U.S.C. §§ 202 and 3601); (3) elimination of the patronage system relating to postal appointments (39 U.S.C. §§ 202 and 1002); and (4) removal of Congress from postal wage setting in favor of collective bargaining (39 U.S.C. Chapter 12).

that the Postal Service share ratesetting jurisdiction with an independent Commission (39 U.S.C. Chapter 36); and (3) requiring an opportunity for on-the-record APA hearings before the Commission on changes in postal rates (39 U.S.C. § 3624).

The objective of removing politics from the Post Office did *not* extend to prescribing ratemaking standards or methodologies.[54] As the court below concluded, "[t]he D.C. Circuit incorrectly equated Congress' clearly expressed intention to remove politics from the post office with removing discretion and judgment from the postal ratemaking process." 663 F.2d at 1198, App. 21a.

2. The Discrimination and Cross-Subsidy Argument

The D.C. Circuit states, and the petitioners here argue, that substantial reliance by the agencies on noncost factors results in discrimination between mail classes contrary to Congress' goal of eliminating such discrimination. *See NAGCP I*, 569 F.2d at 588; NAGCP Br. 29; UPS Br. 18-21, 39-42, 44-46. According to the D.C. Circuit, Congress intended to eliminate the "purposeful discrimination" between mail classes that was "symptomatic of the political process" and did so by "severely curtailing" the agencies' discretion in ratesetting. *NAGCP I*, 569 F.2d at 588.

But the legislative history shows that Congress employed an entirely different method. As the Second Circuit explained,

> Congress . . . simply sought to eradicate discriminatory rate-making by creating an agency shielded from the forces of the lobbyists and politics in general which in the past had caused discriminatory

---

[54] During the floor debates on the conference bill, two of the Senate conferees, Senator Fong (the ranking minority member) and Senator McGee (the Chairman of the Senate Committee), described the many ways in which the bill removed politics from the Post Office, but neither mentioned ratemaking standards or methodologies. 116 Cong. Rec. 26,954-55 (1970), Leg. App. 358-59.

> rate-setting while the rate-making process was conducted under the auspices of Congress.

663 F.2d at 1198 (and authorities cited therein), App. 21a.

Petitioner UPS argues in the same vein that the agencies' reliance on noncost factors, particularly value of service, discriminates against first class mailers, who are allegedly forced to subsidize parcel post service in its competition with UPS' own parcel service. This argument, however, is based on a misconception of the statutory scheme Congress enacted. The legislative history of the Act shows that, after long and unsatisfactory experience with the Post Office Department's fully-allocated costing system, Congress concluded that total reliance on "cost-of-service principles" in allocating costs was undesirable. *See* pp. 27-29, 31, *supra*. It thus included in § 3622(b) a list of noncost factors, which it directed the Commission to consider. The anti-discrimination provision Congress adopted, 39 U.S.C. § 403(c), states that "the Postal Service shall not, *except as specifically authorized in this title*, make any undue or unreasonable discrimination among users of the mails . . ." (emphasis added). Congress thus barred any possible claim that cost allocations by the agencies upon the basis of the noncost factors in § 3622(b) constituted discrimination prohibited by the Act.

The use of value-of-service or demand criteria in assigning costs, moreover, is likely to benefit, not injure, first class mailers, along with all other mail users. As the Kappel Commission pointed out, assigning a greater share of institutional costs to classes of mail with a stronger (*i.e.*, more inelastic) demand serves to spread those fixed costs "over the widest possible base and thereby reduce average costs for all users." Kappel Report at 134, Leg. App. 122. If, on the other hand, parcel post rates were increased due to maximum use of "cost-of-service principles," parcel post customers would dis-

continue using the mails, and other mail users, such as first class users, would ultimately be left to bear an increased share of the Service's institutional costs.

3. *The "Subjectivity" of the Noncost Factors Argument*

A recurring theme in the D.C. Circuit's opinions and the petitioners' briefs is that the Act must be construed to minimize the use of "subjective" and "discretionary" noncost factors and to maximize allocation based on "objective" and "quantifiable" "cost-of-service principles." *See NAGCP III*, 607 F.2d at 399; NAGCP Br. 17; UPS Br. 21.

It is simply wrong, however, to characterize as "objective" or "quantifiable" a system of allocation that extends "cost-of-service principles" beyond identifiable, causally-related costs. Such a system is highly subjective.[55] The now-discarded Cost Ascertainment System allocated institutional costs using "cost accounting formulae" similar to those endorsed by the D.C. Circuit and the petitioners. But the Kappel Commission had already found this method of allocation to be "rigid," "irrational," "arbitrary," and "uninformative."[56] Kappel Report at 29-31, 61-62, 131, Leg. App. 3-5, 6-7, 19; *see* pp. 27-28, *supra*. And the views of the Kappel Commission were

---

[55] In this case, for example, even petitioner NAGCP's witness Cicchetti, testifying in support of the use of "cost-of-service principles," stated that "there are probably 30-odd methods" for "allocating costs using an accounting cost of service technique." Joint Appendix ("J.A.") 194a. Mr. Cicchetti conceded that selection among these numerous allocation techniques to develop a range of allocations "is a matter of subjective judgment." J.A. 195a. And he recognized that the use of accounting "principles" will not track cost causality except by accident. J.A. 193a.

[56] The arbitrary results obtained by extended application of "cost-of-service principles" are illustrated by NAGCP witness Moshman, who testified that by applying different allocation factors, the rate for an identical piece of second class mail varied from 15.9 cents to 40.7 cents, and for an identical piece of parcel post from $1.75 to $6.42. J.A. 216a-217b.

concurred in by both Houses of Congress (*see* pp. 27-29, *supra*).

The Postal Rate Commission has repeatedly emphasized the subjective character of "cost-of-service principles" when applied in the absence of reliable proof of cost causality. In this case, the Commission, discussing the historical development of costing principles, stated,

> The record in R74-1 clearly demonstrates that the allocation of costs on a cost-of-service basis is as susceptible to abuse as an allocation based on relative elasticities of demand. The use of unsupported judgments in choosing distribution keys can support any rate schedule a particular participant may want the Commission to adopt. The need for an objective criterion of cost causality was clearly established. The Commission chose volume variability as its criterion of cost causality.

Recommended Decision, Docket No. R80-1, Appendix B at 44. *See* pp. 7-9, *supra*.

In any case, whether "extended" application of "cost-of-service principles" is more or less "objective" than use of noncost factors, Congress chose the latter. It intended that rates be based on "pricing" factors, as well as on costs whose causal nexus to individual mail categories could be clearly demonstrated.

The agencies' construction is thus reasonable, accords closely with the purposes of the Act, and should be upheld.

II. OTHER ISSUES IN THIS CASE STEM FROM THE D.C. CIRCUIT'S ERRONEOUS INTERPRETATION OF THE STATUTE AND, SINCE THE AGENCIES MUST BE GIVEN THE OPPORTUNITY TO CONSIDER THEM UNDER A CORRECTED LEGAL STANDARD, SHOULD NOT BE DECIDED BY THIS COURT.

For the reasons stated in Part I, we ask the Court to hold that the agencies' interpretation of § 3622(b) was, at the least, "sufficiently reasonable" to be accepted by a reviewing court and that the D.C. Circuit erred in compelling a contrary interpretation. If the Court so holds, it need not and, we submit, should not decide other issues dealt with in the opinion below, which derive from the D.C. Circuit's erroneous interpretation and thus must be addressed again by the agencies under a corrected legal standard.

Apart from its holding on the basic issue of statutory construction, the Second Circuit made two other rulings that are at least arguably within the Court's grant of certiorari. First, the court below considered and upheld the validity of the Commission's assignment of costs using the "service-related cost" concept, even though it "seriously question[ed]" whether the agencies would adhere to that concept once the constraints imposed by the D.C. Circuit were removed. 663 F.2d at 1201-03, App. 28a-32a.[57] Second, the court declined to hold the rates under review to be unlawful, even though they were determined in accordance with the "three-tier" methodology erroneously imposed by the D.C. Circuit, because the court deemed it not "impermissible" for the agencies voluntarily to choose such a methodology. *Id.* at 1201, App. 28a. Both rulings, we believe, were in error. Nevertheless, since these rulings relate to issues that arise only because the D.C. Circuit erroneously compelled the agencies to

[57] Petitioner NAGCP challenged that holding in its petition for certiorari (Question No. 2, Petition for Certiorari in No. 81-1304), which the Court granted without limitation.

adopt a changed methodology, and the agencies have not had an opportunity to assess the issues free of the D.C. Circuit's constraints, it is unnecessary—and, we believe, inappropriate—for the Court to decide these issues at this time.

This Court's long-established rule is that "[w]hen an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)). *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289-90 (1974) ("[i]n view of our conclusion, the case must be remanded to permit the Board to apply the proper legal standard in determining the status of these buyers").

In such cases, the Court does not itself undertake to decide the validity of the agency's action under the corrected legal standard, because that issue is initially for the agency to decide and it cannot be assumed that its earlier action would remain unchanged under a new standard. Thus, in *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944), where a portion of the agency's regulation was found to violate the applicable statute, the Court stated,

> We can hardly assume that the Administrator would have defined "area of production" merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe the elimination of an important factor in the Administrator's equation would have left his equation unaffected . . . . It is not for us to write a definition. That is the Administrator's duty.

Id. at 618-19. Similarly, in *NLRB v. International Longshoremen's Association*, 447 U.S. 490 (1980), where the

agency's characterization of certain work covered by a work preservation agreement was held to be erroneous as a matter of law, the Court declined to go on to decide the lawfulness of the agreement, stating that "[t]hese questions are not appropriate for initial consideration by reviewing courts. . . . Since the Board has not had an opportunity to consider these questions in relation to a proper understanding of the work at issue, we will not address them here." *Id.* at 511. *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

Here, also, the agencies have "not had an opportunity to consider" the service-related cost issue "in relation to a proper understanding of" § 3622(b), and it would be "the sheerest guesswork" to try to predict their action on that issue once the D.C. Circuit's erroneously-imposed requirements are removed from the "equation." The service-related cost concept, as the Second Circuit recognized (663 F.2d at 1201, App. 28a), was "conjured up" by the agencies in obedience to *NAGCP I*'s holding that they are required to "assign" costs using "cost-of-service principles" as an intermediate step in the allocation process. 663 F.2d at 1203, App. 32a. The court below "seriously question[ed]" whether the Commission "will remain adamant in its employment of SRC once the strictures of *NAGCP I* and *III* have been removed." *Id.* It is significant, moreover, that the Governors refused to accept the service-related cost concept in this proceeding, terming it "a transparent fiction." [58]

Nor should the Court consider whether the agencies may voluntarily follow the "three-tier" methodology previously imposed on them by the D.C. Circuit. Although

---

[58] The suggestion of intervenor Direct Mail/Marketing Association that service-related costs are required to be "attributed" is totally inappropriate for consideration by the Court. *See* DMMA Br. 37. Not only did the Commission "assign" such costs under the compulsion of an erroneous interpretation of the Act, but also the issue of "attribution" was never even raised during the agency proceedings.

the Second Circuit addressed it, this issue is academic. Not only did the agencies adopt and consistently follow a "two-tier" methodology prior to *NAGCP I*, but even afterward they repeatedly expressed disagreement with the D.C. Circuit's views. *See* pp. 12-13, 15, *supra*. It is surely unrealistic for the Court to anticipate that the agencies will unaccountably have a change of heart and voluntarily embrace a viewpoint previously anathema to them.

Accordingly, the Court should not decide these other issues. Nor should the agencies be bound by the Second Circuit's rulings when they give "initial consideration" to such issues under a corrected standard.

CONCLUSION

The judgment of the Second Circuit should be affirmed. Having decided the central issue of statutory construction under 39 U.S.C. § 3622(b), this Court should decline to consider other issues, stemming from the D.C. Circuit's erroneous interpretation of the statute, that are not appropriate for initial consideration by a reviewing court. The agencies should be given the opportunity to address these issues under the corrected legal standard, without being bound by the Second Circuit's rulings on such issues.

Respectfully submitted,

JOHN M. BURZIO
Counsel of Record
THOMAS W. MCLAUGHLIN
HYDEMAN, MASON, BURZIO & LLOYD
1220 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 775-0725
Counsel for Time Incorporated

TONI K. ALLEN
Counsel of Record
ROBERT M. LICHTMAN
WALD, HARKRADER & ROSS
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200

DIANA M. DANIELS
NEWSWEEK, INC.
444 Madison Avenue
New York, New York 10022
(212) 350-2530
Counsel for Newsweek, Inc.

September 7, 1982

Respondent's Brief

8

Nos. 81-1304, 81-1381

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF OF RESPONDENTS RECORDING INDUSTRY ASSOCIATION OF AMERICA AND ASSOCIATION OF AMERICAN PUBLISHERS

IAN D. VOLNER
Counsel of Record
RICHARD M. SCHMIDT, JR.
N. FRANK WIGGINS
MARK L. PELESH

COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860

Counsel for Recording Industry Association of America and Association of American Publishers

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Does Section 3622(b)(3) of the Postal Reorganization Act of 1970 contain a precise description of the extent to which Postal Service costs must be distributed on the basis of estimations of cost causation, or did the Congress delegate assessment of this issue to the Postal Service and the Postal Rate Commission?

PARTIES TO PROCEEDING BELOW

American Business Press, Inc.

American Cancer Society

American Lung Association

Association of American Publishers, Inc.

Classroom Publishers Association

Council of Public Utility Mailers

Direct Mail/Marketing Association, Inc.

Dow Jones Company, Inc.

International Labor Press Association, AFL-CIO/CLC

Magazine Publishers Association, Inc.

Mail Order Association of America

March of Dimes Birth Defects Foundation

National Association of Greeting Card Publishers

National Easter Seal Society

National Wildlife Federation

Newsweek, Inc.

Parcel Shippers Association

Reader's Digest Association, Inc.

Recording Industry Association of America, Inc.

St. Jude Children's Research Hospital

Time, Inc.

United Parcel Service of America, Inc.

Warshawsky Company

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDING BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	8
A. The Language Of The Act	10
B. The Legislative History	13
C. The Broad Purposes Of The Act	19
D. Juridical Considerations	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

Association of American Publishers, Inc. v. *Board of Governors*, 485 F.2d 768 (D.C. Cir. 1972) 23

Burnet v. *Guggenheim*, 288 U.S. 280 (1933) 26

Cheng Fan Kwok v. *Immigration and Naturalization Service*, 392 U.S. 206 (1968) 26

Colorado Interstate Gas Co. v. *F.P.C.*, 324 U.S. 581 (1945) 21, 25

D.C. Federation of Civic Associations v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1970) 19

Hanson v. *Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) 22

International Air Industries, Inc. v. *American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1974), *cert. denied*, 424 U.S. 943 (1976) 22

National Association of Greeting Card Publishers v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 6

National Association of Greeting Card Publishers v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ..... 4, *passim*

Newsweek, Inc. v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981) ..... 2, *passim*

In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 23

Railroad Commission of Texas v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940) 24

STATUTES:

28 U.S.C. § 1254(1) 2

Postal Reorganization Act of 1970, 39 U.S.C. § 101 *et seq.* ..... 2, *passim*

Section 3621 10

Section 3622(b) ..... 3, *passim*

Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, 90 Stat. 1303 ..... 3 n.1

Table of Authorities Continued

Page

OTHER:

1 A. Kahn, *The Economics of Regulation* (1970) 21

Report of the President's Commission, Towards Postal Excellence (1968) 13

Nos. 81-1304, 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENTS RECORDING INDUSTRY ASSOCIATION OF AMERICA AND ASSOCIATION OF AMERICAN PUBLISHERS

Respondents Recording Industry Association of America, Inc., and Association of American Publishers, Inc., submit their brief on the merits of this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit and the Order denying rehearing are reported at 663 F.2d 1186 (1981).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3622(b) of the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. § 101 *et seq.*), provides as follows:

> (b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> (1) the establishment and maintenance of a fair and equitable schedule;
>
> (2) the value of the mail service actually provided each class or type of mail service to both the sender and the recipient, including but not limited to the collection, mode of transportation, and priority of delivery;
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type;
>
> (4) the effect of rate increases upon the general public, business mail users, and enterprises in the private sector of the economy engaged in the delivery of mail matter other than letters;

(5) the available alternative means of sending and receiving letters and other mail matter at reasonable costs;

(6) the degree of preparation of mail for delivery into the postal system performed by the mailer and its effect upon reducing costs to the Postal Service;

(7) simplicity of structure for the entire schedule and simple, identifiable relationships between the rates or fees charged the various classes of mail for postal services;

(8) the educational, cultural, scientific, and informational value to the recipient of mail matter; and

(9) such other factors as the Commission deems appropriate.

Id. § 3622(b).[1] Appendix C to the Petition for Writ of Certiorari in No. 81-1304 contains other relevant statutory provisions of the Postal Reorganization Act of 1970.

STATEMENT OF CASE

This case presents for determination a narrow question of statutory interpretation arising under the Postal Reorganization Act of 1970.

Respondents, the Association of American Publishers, Inc., and Recording Industry Association of America, Inc. ("AAP-RIAA"), are trade associations constituting the principal representatives of the book publishing and

---

[1] As originally passed, the Act contained eight factors. The factor relating to "the educational, cultural, scientific, and informational value to the recipient of mail matter," 39 U.S.C. § 3622(b)(8), was added in 1976. Postal Reorganization Act Amendments of 1976, Pub. L. No. 94-421, § 10, 90 Stat. 1303, 1311.

audio transcription industries in the United States. The members of the two organizations account for 85% or more of the total output of books and audio transcriptions (primarily records and tapes) produced and distributed in this country annually. The members of the two organizations use virtually all classes of mail but have a particular interest in Special Rate Fourth Class mail, the mail classification embracing books, records, tapes and other educational, cultural and informational materials. Although the rates for Special Rate Fourth Class mailings are not directly at issue here, the questions presented in this case are of importance to the proper determination of postage rates which AAP-RIAA members will be compelled to pay in the future.

As disclosed in the briefs of the petitioners, *see, e.g.*, Brief of Petitioner National Association of Greeting Card Publishers at 2-16, a considerable history of regulatory and judicial action underlies this case. We believe that only small parts of this history are directly germane to the resolution of the central question before the Court.

In *National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ("*NAGCP I*"), the U.S. Court of Appeals for the D.C. Circuit had occasion to interpret the ratemaking provisions of the Postal Reorganization Act of 1970. The portion of the Act most centrally concerned with ratemaking issues is Section 3622. The analysis in *NAGCP I* was focused primarily on Section 3622(b)(3). The D.C. Circuit determined that the Postal Rate Commission (and the Board of Governors of the Postal Service) had deviated impermissibly from the congressional directive contained in that portion of the statute by failing to employ sufficiently far reaching measures of the costs caused by each class of mail in deriving rates.

The *NAGCP I* court and the parties to that case enjoyed a general consensus that Section 3622(b)(3) required that some, but not all, of the costs of providing postal service be reflected in the rates for the categories of service causing such costs. This agreement yielded to a considerable divergence of opinion on a subsidiary issue. The parties took sharply divided positions on the appropriate magnitude of costs to be allocated on the basis of cost causation. The Postal Rate Commission and Postal Service had, in the underlying ratemaking proceedings, endorsed a methodology that allocated costs to those service users thought to cause the costs on the basis of volume variability. This procedure measured the extent to which costs were increased by increases in the volume of mail pieces. Application of this analysis resulted in the distribution of 52.5% of the total costs of service among the various categories of service as price floors. Consequently, there remained 47.5% of the total costs to be distributed among services by recourse to the non-cost factors catalogued in Section 3622(b).

The *NAGCP I* court found that this methodology violated the statute. The Court concluded that the use of volume variability as the sole mechanism for fulfilling the command of Section 3622(b)(3) contravened congressional intent:

> Congress intended attribution under subsection 3622(b)(3) to extend beyond minimally attributable costs and to include to a significant extent those additional costs which, although not measurably variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service.

NAGCP I, 569 F.2d at 586 (footnote omitted). The court proceeded to outline a comprehensive statement of the

methodology it believed required for determining postal rates:

> Subsection 3622(b)(3) provides, in short, that the Postal Rate Commission must first of all attribute to each mail class or postal service all postal costs which may reasonably be determined, through variability theory as well as through other reasonable inferences of causation, to be the consequence of providing the service. It must then distribute among the mail classes and services that significant portion of all remaining costs of the Postal Service that may reasonably be assigned to each on the basis of best available cost-of-service estimates. The residuum of costs is subject to discretionary allocation in accord with the noncost factors set forth in the Act.

Id. at 589 (footnote omitted).

In response to the statutory interpretation pronounced by the *NAGCP I* court, the Postal Service and the Postal Rate Commission in subsequent proceedings supplemented the volume variability cost allocation scheme by recourse to a methodology that came to be called service related costs. The D.C. Circuit approved postal rates structured through the application of this extended attribution of total costs to the cost-causing service categories. *National Association of Greeting Card Publishers* v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) *("NAGCP III")*.

At the close of yet another round of postal ratemaking proceedings, an appeal was perfected to the U.S. Court of Appeals for the Second Circuit. In assessing the propriety of the postal rates established in the underlying proceedings, the Second Circuit found it necessary to construe Section 3622(b) of the Act. After consideration of the language of the statute and the history of its enactment, that court determined that the meaning accorded

the statute by the *NAGCP I* and *NAGCP III* courts was incorrect. *Newsweek, Inc.* v. *United States Postal Service*, 663 F.2d 1186 (2d Cir. 1981) ("*Newsweek*"). The *Newsweek* court concluded that Section 3622(b) did not contain the command in favor of extended allocation of costs read into the statute by the D.C. Circuit:

> [W]e reject the D.C. Circuit's rulings to the extent that they interpreted section 3622(b) as requiring the attribution and assignment of costs based on cost-of-service principles to the maximum extent possible. There is nothing in the legislative history to suggest that attribution of fifty percent of postal costs is inadequate. We believe that Congress intended that the PRC enjoy much more discretion and greater latitude in its rate-setting determinations.

Newsweek, 663 F.2d at 1200 (footnotes omitted).

The *Newsweek* court concluded, however, that the service related cost methodology developed to satisfy the statutory interpretation of the D.C. Circuit was, although not compelled by the Act, permissible under the considerable range of discretion delegated by the Congress to the Postal Rate Commission and the Postal Service.

SUMMARY OF ARGUMENT

This case brings to the Court a dispute concerning the appropriate reading of Section 3622(b). None of the customary aids to statutory construction support the conclusions regarding Section 3622(b) reached by the *NAGCP I* and *NAGCP III* courts. The language of the statute does not insist that all or nearly all of the total costs of postal service be allocated among categories of service on the basis of cost causation. The history of congressional deliberations surrounding the enactment of Section 3622(b) is, similarly, devoid of support for such a

conclusion. The apparent congressional purposes embodied in Section 3622(b) do not require extended distribution of costs on a causal basis. Finally, the juridical value of minimized intrusion of the courts into matters marked by the need for applied expertise is best served by the statutory construction reached by the *Newsweek* court.

ARGUMENT

At the threshold it is important to have clearly in mind the extent to which this case presents a sharply defined dispute hinged on the variant readings of Section 3622(b) of the Act by the *NAGCP* courts, on the one side, and the *Newsweek* court, on the other. We believe that the petitioners have made too much of the difference between the opinions of the D.C. Circuit and the Second Circuit. It is undeniable that the statutory interpretation under which the *NAGCP I* court approved the postal rates at issue in that case was directly at odds with the statutory construction employed by the *Newsweek* court to approve the rates before it.

It remains, however, that the constructions lent subsections 3622(b)(1)-(9) by the D.C. Circuit and the *Newsweek* court are in harmony in several regards:

1. The cost-based considerations reposed in subsection 3622(b)(3) should serve as the starting point in ratemaking. *NAGCP I*, 569 F.2d at 587; *Newsweek*, 663 F.2d at 1193, 1202.

2. Costs allocated to the various classes on the cost causative calculus of subsection 3622(b)(3) must serve as a floor for the rates finally derived for each class; the rates established for any class may not be reduced below the 3622(b)(3) floor levels. *NAGCP I*, 569 F.2d at 586 n.58; *Newsweek*, 663 F.2d at 1200.

3. Less than all Postal Service costs should be distributed on the basis of 3622(b)(3) considerations. The eight remaining factors in 3622(b) must have some application, and if all costs are distributed at the threshold stage of 3622(b)(3) analysis these other factors would, effectively, be written out of the statute. *NAGCP I*, 569 F.2d at 587; *Newsweek*, 663 F.2d at 1200, 1202.

The statutory construction applied by the D.C. Circuit cases differs from that of the *Newsweek* court in gauging the extent to which costs must be allocated solely on the 3622(b)(3) criterion. In *NAGCP I*, the court concluded that more than 52% of total service costs must be distributed on the strength of measurements and estimates of causation. The *Newsweek* court found no such requirement in the statute.

In light of this narrow substantive difference, a distinction that may have no meaning in the real world, we suggest that the arguments advanced by the petitioners on brief go well beyond the issue appropriate for determination by the Court. This case does not present for decision the issue whether "long term" or "short term" costs are to be used as the basis of ratemaking, contrary to the assertions of petitioner United Parcel Service. That issue was not addressed by either of the Circuits and is, in any event, moot as intervenor Direct Mail/Marketing Association, points out. Brief for Intervenor Direct Mail/Marketing Association, Inc. at 31-33. Still less does this case call for a definitive statement by the Court of the manner in which transportation costs are to be recovered through rates, contrary to the contentions of petitioner National Association of Greeting Card Publishers. These and other specific issues of ratemaking methodology are not properly before this Court.

If there is an issue that must be resolved by the Court, it is whether Section 3622(b)(3) contains a precise description of the extent to which Postal Service costs must be attributed on the basis of estimates of cost causation as the *NAGCP* courts concluded or whether Congress intended to delegate the assessment of this issue to the Postal Service and the Postal Rate Commission. We shall demonstrate in the following discussion that the language of the Act, the history of congressional deliberation, the apparent purposes of Congress and considerations of proper judicial function all support the conclusion reached in *Newsweek*.

A. The Language Of The Act.

The structure and language of the Act confirm the frailty of the D.C. Circuit's interpretation. Section 3621 states the basic policy underlying the Postal Rate Commission's authority: "Postal rates and fees shall provide sufficient revenues so that the total estimated income and appropriations to the Postal Service will equal as nearly as practicable total estimated costs of the Postal Service." Section 3622 then sets out the procedures and standards for establishing rates for each class of service to fulfill this goal. Subsection 3622(b) insists that the Commission make recommendations on rates for each mail class "in accordance with the policies of this title and the following factors" and then lists nine factors.

In reaching the conclusion that Congress intended that more than 52% of all Postal Service costs be distributed through the threshold application of 3622(b)(3), the *NAGCP I* court relied upon two bits of statutory language. The first of these was the appearance of the word "requirement" in 3622(b)(3). The court observed that none of the other factors in 3622(b) is labeled a "requirement."

The word "requirement" was added to the statute in conference. Neither the House nor Senate bills expressly labeled any of the 3622(b) factors as "requirements."[2] The Conference Committee Report offers no explanation for actions taken in conference. The absence of any explanation for the addition of the word "requirement" to Section 3622(b)(3) clouds the usefulness of this single word as a device for securing the reading contended for by the *NAGCP I* court. It may well be that the presence of the word "requirement" in 3622(b)(3) provides support for the conclusion that the cost causative analysis of the (b)(3) factor should be undertaken before application of the remaining factors. Similarly, one might cogently argue that the single "requirement" among the 3622(b) factors should be accorded enhanced dignity by the insistence that the contribution to final rate analysis made by this factor should not be diluted by application of other factors. But those arguments do not get one beyond the accepted precepts that 3622(b)(3) analysis should come at the threshold of rate structuring and that the rate floor established through 3622(b)(3) allocations must not be reduced in ensuing stages. There is nothing in the word "requirement" that tells one what proportion of total service costs are meant to be distributed in reliance upon this factor.[3] "Requirement" is a qualitative not a quantitative descriptor; it is not instructive of the degree to which

---

[2] As the Second Circuit pointed out, the Senate Report spoke of all of the enumerated criteria as "requirements." *Newsweek*, 663 F.2d at 1199.

[3] Still other constructions of "requirement" are possible. It may simply be a reference to the broad command of Section 3621 that rates and fees approximately equal total costs, or the word "requirement" may represent nothing more than a textual eccentricity.

Congress meant to require extended application of Section 3622(b)(3).

The *NAGCP I* case also leans heavily on the reference in 3622(b)(3) to "direct and indirect postal costs." This phrase, too, was added without explication by the Conference Committee. The *NAGCP* courts recognized that this language could not be read to require the distribution of all "direct and indirect postal costs" through Section 3622(b)(3). To read the statute in this manner would deprive subsections 3622(b)(1)-(2) and (4)-(9) of meaning, since the universe of postal costs is subsumed by the two categories "direct" and "indirect."[4] If the statutory phrase "direct and indirect postal costs" cannot be applied quantatively to include all such costs, that phrase provides small guidance on the extent to which costs must be distributed in accordance with the requirement of Section 3622(b)(3). The *NAGCP I* court was unable to make more of this language than the conclusion that through its use the Congress must have intended to accord "a substantial breadth to [the subsection's] coverage." *NAGCP I*, 569 F.2d at 585. One might concede this conclusion without materially advancing the inquiry central to this case. What is wanting is a transition between the "substantial breadth" appropriately ceded to subsection 3622(b)(3) and the insistence that substantially all postal service costs must be distributed through that one among the eight factors designed by Congress to govern ratemaking policy. The language of Section 3622(b)(3) will not carry the burden of conclusions reached by the *NAGCP I* court.

---

[4] The petitioners agree with this proposition. *Brief of the United Parcel Service of America, Inc.* at 29; *Brief of National Association of Greeting Card Publishers* at 17.

B. The Legislative History

The *NAGCP* courts also rely upon the history of Congressional consideration of postal reform in support of their reading of Section 3622(b). In overview, this argument structures a conflict between the House and the Senate on the issue of ratemaking methodology, determines that the Senate prevailed in this dispute and imputes to Section 3622(b) a meaning derived from a perception of the Senate's intentions. There are at least two flaws to this argument. The House and Senate were not significantly at odds over matters of ratemaking theory; the conflict posited by the *NAGCP* courts is illusory. More telling still, neither the House nor the Senate advocated the conclusions attached to Section 3622(b) by the *NAGCP* courts.

The history of the Act has a fairly well-defined starting point. The Kappel Commission issued a report in 1968 calling for a major reform of the organization and operation of the Postal Service. *Report of the President's Commission, Towards Postal Excellence* (1968) (Joint Appendix of Relevant Legislative Material ("J.A.L.") at 2). The Kappel Commission forcefully noted dissatisfaction with the fully allocated or fully distributed cost system employed by the Post Office. The fully allocated cost method was described as "arbitrary," "uninformative," and "inappropriate for ratemaking." J.A.L. at 3-4, 20-21, 45. The Kappel Commission concluded that ratemaking should be guided by the "requirement" that total revenues should cover total costs. J.A.L. at 7, 18, 35. The Kappel Commission further concluded that a two-stage analysis should be employed in setting rates. Rates for each class would be set so that revenues would cover the incremental costs of providing that service. Remaining institutional costs would be assigned on the basis of marketing factors, such

as demand and other considerations. J.A.L. at 6-7, 9, 18-20, 21.

Several bills were introduced in the House and Senate based upon the report of the Kappel Commission. J.A.L. at 220, 295, 352, 372. While these bills contained a number of differences, they were in substantial harmony on the principles to guide postal ratemaking. The House and Senate bills all contained statements of general policy requiring that total revenues should approximately equal total costs. J.A.L. at 215, 220, 238, 275, 287 (House); J.A.L. at 240, 244, 250, 256, 262-63, 308 (Senate).

The bills originating in each chamber also took consistent approaches in establishing the threshold standard (contained in Section 3622(b)(3) as finally enacted) for setting rates for particular mail classes. The House bills would have had each class bear the costs "demonstrably related" to the class. J.A.L. at 211, 220, 238, 287. The Senate bills would have had the ratemaking authority first consider costs "properly attributable" or "properly assignable" to a given class. J.A.L. at 241, 244-45, 251, 256, 263, 308. Although the D.C. Circuit (and petitioners) insist that this difference in terminology denotes an important difference in ratemaking methodology, the substantive difference in the House and Senate formulations has not been articulated. We submit that it does not exist.

As the Second Circuit pointed out, there were important differences between the House and Senate bills. The differences germane to ratemaking issues were largely procedural. The Senate advocated greater independence for the Postal Rate Commission in formulating rates (including freedom from Congressional veto). On these matters the Senate position prevailed. *See Newsweek*, 663 F.2d at 1198. The D.C. Circuit's comparison of the two bills notes the difference in formulation between the Sen-

ate version of the ratemaking criteria and that proposed by the House and then flatly asserts that the Senate standards "were more stringent" and were further strengthened in conference. *NAGCP I*, 569 F.2d at 589. As a matter of ordinary language, however, it is far from clear that the terms "properly attributable" or "properly assignable" as they appeared in Senate bills, the term "demonstrably related" as it appeared in House bills and the final phrasing of Section 3622(b)(3) as enacted have materially different meanings: all involve a loosely specified principle of causality.

If one is to construct a calculus of the relative "stringency" of the ratemaking provisions that appeared in House and Senate bills, there is good reason to believe that the House versions were the more rigorous in their insistence on distribution of costs to the service categories causing those costs. The House bills contained a single standard to guide the Postal Service in the derivation of rates, the provision insisting that "at least those costs demonstrably related to the class of service in question will be borne by each such class and not by other classes of users . . . ." J.A.L. at 211, 220, 238. The legislation originating in the Senate included a parallel provision (substituting for the operative House description of causation the phrases "properly attributable" and "properly assignable") but in the Senate bills, as in the measure that emerged from conference, this cost causative factor was only one among several to be "take[n] into account" in the formulation of rates. *See* J.A.L. at 240, 244, 251, 256, 263, 307. The Senate report makes it quite clear that the formulation of "postal rates, fees, and classifications [that] are reasonable and equitable" must be informed "by careful consideration of all the specific public-interest factors that the statute requires be taken into account . . . ." J.A.L. at 307; *see id.* at 308.

Whatever might be made of the differences of the language used in the House and Senate bills,[5] one clear and uniform ratemaking precept emerges from both the House and Senate deliberations. The words employed in the earlier drafts of the legislation that emerged from Committee as Section 3622(b)(3) were designed to embody the economic concept known variously as "incremental" or "marginal" costing. Although the legislators shied from employing traditional economic labels in an attempt to avoid confusion, Section 3622(b)(3) was meant to require that each class of service bear at least the incremental cost associated with providing that service. *See, e.g.*, J.A.L. at 63, 310. The wisdom of employing undefined terms such as "demonstrably related" and "properly attributable" as a device for eluding the uncertainty of the term "incremental cost" may be questioned. But it is clear that in using the less technically meaningful phrases, both the House and Senate meant to capture the essential precepts of incremental cost pricing. A nontechnical definition of incremental costs equates this term with "the per-unit addition to total cost experienced by reason of additional sales of the service in question."

---

[5] The important substantive distinction which the D.C. Circuit claims to find between the House and Senate versions of the ratemaking criteria was not apparent to the drafters of the legislation. At one point in the debate in the Senate the House bill was offered as a substitute for the Senate bill; Senators McGee and Fong engaged in a colloquy pointing out the differences between the two bills. Although they noted that the two bills provided for somewhat different ratemaking procedures, the distinction that they found sufficiently important to underscore was the greater degree of discretion vested in the Postal Rate Commission by the Senate language. No reference was made to differences in ratemaking standards or to the semantic differences between the House and Senate terms for defining cost causation and its application. J.A.L. at 354.

J.A.L. at 47 (footnote omitted). Incremental cost closely mirrors volume variable costs; both reflect changes in cost caused by changes in output. The intention of the Congress to rely upon an incremental cost conception confounds the construction placed upon Section 3622(b)(3) by the D.C. Circuit because the court's analysis requires distribution of costs which are not measurably variable.

Perhaps more importantly to the analysis of Section 3622(b)(3), incremental costing is at antipodes with fully distributed cost methodologies. The former focuses on the causes of additions to total cost where the latter seeks to distribute all costs.

By their endorsement of incremental cost analysis, by whatever name, both the House and Senate were in agreement with the conclusion of the Kappel Commission in rejecting the imposition of fully allocated cost systems as the basis for determining postal rates:

> Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. The Committee rejects the suggestion on the principle that no particular cost accounting system is recommended and no particular classification of mail is required to recover a designated portion of its costs beyond its incremental costs. That decision is for the Postal Rate Commission to determine, in accordance with the general criteria enacted by law.

J.A.L. at 310.

The D.C. Circuit's interpretation of Section 3622(b)(3) produces a ratemaking methodology analytically indistinguishable from the precepts of fully allocated costing disdained by the Kappel Commission. If, as a matter of statutory construction, the Postal Service and Rate

Commission are required to use accounting principles or other surrogates for cost causation in the attribution of costs, then there is no rational basis under the statute for determining where the use of accounting conventions is to stop and the application of what the D.C. Circuit called the noncost factors is to begin. The D.C. Circuit's decision requires that costs which are "not measurably variable" and therefore "not directly attributable" but are determined "with reasonable confidence" are "the consequence of providing service" be allocated "based on accounting principles." All costs, including overheads and institutional costs, are in some sense the consequence of providing service. Thus, under the D.C. Circuit's analysis, all of those costs (other than those which are measurably variable) must, as a matter of statutory command, be allocated on the basis of accounting conventions or hypothetical models. That amounts to the imposition of a fully allocated cost system. This logic entails the judicial imposition of the one ratemaking methodology which the Congress plainly rejected.

One further aspect of the legislative history of 3622(b)(3) deserves brief treatment. The petitioners here take the *Newsweek* court to task for its reliance upon a statement of the House Conference Managers as an aid to statutory construction. The Conference Report does not discuss ratemaking standards. The House Managers' Statement summarizes the results of the conference deliberations in these words:

> The provision in the conference substitute with respect to costs attributable to a class of mail or type or [sic] service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the

> consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs.

J.A.L. at 334. During the House's consideration of the Conference Report, Representative Udall, one of the House Managers, made substantially the same statement. J.A.L. at 365.

It may be that the statements on the part of the House conferees cannot be considered dispositive of the Senate's intentions under the teaching of cases such as *D.C. Federation of Civic Associations* v. *Volpe*, 434 F.2d 436 (D.C. Cir. 1970). But this evidence does considerable damage to the construction of subsection 3622(b)(3) contended for by the *NAGCP I* court. The House meant something by the text that is now 3622(b)(3) very different from what the D.C. Circuit would read the language to mean.

If there were differences of nuance in the meanings associated by the House and the Senate with the Conference Committee language, these differences were neither large nor important to the meaning of Section 3622(b)(3). Both chambers intended that the concept of incremental costs be applied through the statute.

C. The Broad Purposes Of The Act.

The D.C. Circuit correctly recognized that a central aim of the Postal Reorganization Act was to remove the Postal Service and the establishment of postal rates from the realm of "politics." Two corollary ambitions were instrumental to this goal. As a part of its overall aim, the Congress wished to establish postal ratemaking on bases which would (a) avoid cross-subsidization of rates for one class by rate levels imposed upon another and (b) main-

tain competition between the Postal Service and private express companies. It does not follow, as the *NAGCP* courts seem to have believed, that these aspirations can be achieved only by stretching the application of Section 3622(b)(3) to "maximize the use of cost-of-service principles." *NAGCP I*, 569 F.2d at 587.

The construction placed upon the statute by the Second Circuit does not yield ratemaking standards any more subjective or "political" than those dictated by the *NAGCP I* court. The notion that the use of "costing" principles assures objective results is specious. When an attempt is made to extend the measurement of cost causation beyond internally validating techniques such as volume variability, empiricism rapidly gives way to judgment or even surmise. The posture of some of the participants before this Court illustrates the point. Although it supports the analysis of the D.C. Circuit, petitioner National Association of Greeting Card Publishers maintains that the use of the service related cost concept—an estimation of caused costs developed by the Postal Service in specific response to the D.C. Circuit's demand for extended attribution—is arbitrary and unreasonable. By contrast, Intervenor Direct Mail/Marketing Association (although it arrives at its result from a somewhat different route), asserts that the service related cost concept comports with the requirements of the Act. Whether one centers the debate on questions of cost causation or upon other grounds, the ratemaking process will inevitably involve a contest of competing points of view.[6] Ratemak-

---

[6] There is a sense in which the pricing methodology rejected by the *NAGCP I* court opens fewer issues to debate—and is, thus, in a sense less "political"—than any process relied upon for more extended distribution of costs on the basis of estimated cost causation. The volume variability measure there employed was relatively free of

ing remains an inexact process. *See, e.g., Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945).

The D.C. Circuit's apparent conviction that extended application of Section 3622(b)(3) is required as a safeguard against improper price subsidies is erroneous as well. Fully distributed costing systems are not required to assure a fair distribution of price burden among the users of various categories of postal services. So long as a class of service defrays the incremental costs of providing that service, it cannot be said that other classes of service are unfairly burdened. *See, e.g.*, 1 A. Kahn, *The Economics of Regulation*, 131-50 (1970).[7] The Second Circuit's interpretation of Section 3622(b) very clearly establishes that all costs directly traceable to the provision of service to a particular class represents the minimum level of rates for that class, thus assuring a distribution of costs among all users that is fair and non-prejudicial.

Similarly, the Second Circuit's interpretation of the statute does not permit unfair competition or predatory pricing by the Postal Service in areas where it experiences competition from private express companies. Although the matter is not free from dispute, there is a

---

dispute. The application of inverse elasticity to raise rates to a level sufficient to defray total costs was similarly, if accepted as methodologically appropriate, a relatively mechanical exercise.

[7] This point is easily illustrated. Assume a service offering (Class A) with total costs of $100. If a second variety of service is added, bringing the combined total costs of both services to $150, the users of service A are not prejudiced so long as their total cost of service does not exceed $100, that is, if the users of Class B pay the incremental cost of $50. This is true even if the total cost of providing Class B service independently of service A would be greater than $50.

substantial and respectable body of opinion which holds that the establishment of rates or prices at levels at least equal to marginal or incremental costs is highly persuasive evidence that the rates are not anticompetitive or predatory. *See, e.g., International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 723-25 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). The Congress relied upon the concept of incremental cost pricing to guard against anticompetitive consequences of Postal Service rates. The Second Circuit's application of Section 3622(b)(3) secures this protection. It assuredly cannot be said that the Second Circuit was "unconcerned" with the danger of predatory pricing by the Postal Service of services in which it encounters competition, Brief of Petitioner United Parcel Service of America, Inc., at 40, or that its construction of the statute will permit the Postal Service to engage in anticompetitive ratemaking.

The D.C. Circuit's notion that extended attribution of costs will limit the play of "political" considerations is both naive and incorrect. The supposition that Section 3622(b)(3) must be applied to the broadest possible segment of total costs in order to prevent unfair subsidies among classes of service or to control anticompetitive consequences lacks analytic support. The more narrow construction given to Section 3622(b)(3) by the Second Circuit will work quite as well to achieve these ends.

For these reasons, the D.C. Circuit's decision cannot be supported by the language, legislative history or fundamental purposes of the Act.

D. Juridical Considerations.

The most that petitioners can draw from the statutory language and legislative history of Section 3622(b) is some uncertainty as to the meaning of that provision. If this Court finds itself caught in the equipoise of that uncertainty, it may and should look to the prudential consequences of its endorsement of one reading or the other. There can be little doubt but that broad considerations of judicial economy and the appropriate role of the judiciary in oversight of postal ratemaking affairs weighs heavily against the interpretation contended for by petitioners and the *NAGCP* courts.

The construction of Section 3622(b) of the Act reached by the *NAGCP* courts and urged by the petitioners here will have the result of intruding the federal courts into issues of proper ratemaking policy at a level of inappropriate intimacy. In its first contacts with the Act, the D.C. Circuit recognized the difficulties of becoming mired in the process by which postal rates are set:

> A reviewing court under familiar jurisdictional principles may not, and under human limitations generally could not, reassess the weights given by a ratemaking agency to different factors, absent a legislative direction as to precisely what gravity each factor bears. All that a court may properly do is to consider whether the agency did take into account all the relevant factors and no others.

Association of American Publishers, Inc. v. *Board of Governors*, 485 F.2d 768, 774-75 (D.C. Cir. 1972). The caution reflected in Judge Wyzanski's formulation is an appropriate one. This Court has long held that, where a general statute requires an administrative agency to set rates, the precise formula to be followed in fulfilling this duty should be left to the discretion of the agency. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 766-67

(1968); *Railroad Commission of Texas* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940). In the latter case, this Court reversed because the federal courts had overstepped the appropriate bounds of review:

> Both the District Court and the Circuit Court of Appeals appear to have been dominated by their own conception of the fairness and reasonableness of the challenged order. For all we know, the judgment of these two lower courts may have been wiser than that of the Commission, and their standard of fairness a better one. But whether a system of proration based upon hourly potential is as fair as one based upon estimated recoverable reserves or some other factor or combination of factors, is in itself a question for administrative and not judicial judgment.

Id. at 581.

If the Congress intended the reading of Section 3622(b)(3) found in that provision by the *NAGCP* courts, the judiciary will be required to review ratemaking proceedings in microscopic detail in order to police compliance with the statutory dictates. This is so because, under the D.C. Circuit's reading of the Act, small discretion is permitted to the postal authorities in setting rates. As the D.C. Circuit read Section 3622(b):

> Congress intended attribution under subsection 3622(b)(3) to extend beyond minimally attributable costs and to include to a significant extent those additional costs which, although not measurably variable and therefore not directly attributable, may nonetheless be determined with reasonable confidence to be the consequence of providing the service.

NAGCP I, 569 F.2d at 586 (footnote omitted).

This construction would require that reviewing courts determine, not as a measure of the rationality or

reasonableness of agency action, but as a gauge of compliance with statutory requirements, that "a significant" magnitude of non-volume variable costs had been distributed through 3622(b)(3). This process is likely to result in the judicial codification of the distribution keys used in the extended attribution of costs. Insofar as the D.C. Circuit's formulation also requires that the 3622(b)(3) allocation extend as far as "reasonable confidence" permits, courts will be required, again as a matter of statutory construction and not the more removed review more common and appropriate to judicial oversight of technical administrative actions, to immerse themselves in the technical, economic and accounting considerations giving rise to rate determinations.

The judicial activism that will necessarily attend application of the D.C. Circuit's statutory reading would hinder the ratemaking process and the efficient working of the judiciary alike. As this Court has observed, ratemaking "involves judgment on a myriad of facts. It has no claim to an exact science . . . ." *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581, 589 (1945). It is an evolutionary process in which improvements and greater accuracy emerge from a conflict between experts and the application by the agency of its own reasoned, disinterested expertise based upon the evidence before it. By its very nature, the judicial, in contrast to the administrative process, does not lend itself to the superintendence of an ongoing process involving highly technical and complex propositions of fact and economic theory. It is for precisely this reason that this Court has defined the limits of judicial review of ratemaking determinations with care. The vice of the D.C. Circuit's analysis is that, in ignoring these lessons, it has constrained the ratemaking process in ways that preclude evolution and improvement. The construction achieved by the *NAGCP* courts

will also shackle courts to the business of ratemaking into the foreseeable future.

It is frequently the case that legislation speaks in an ambiguous voice. Often the choice between two or more meanings that might be attached to a congressional command is clouded with uncertainty. When making a dispositive construction adopting one and rejecting other available interpretations of congressional intendment, this Court may consider the collateral consequences of the results of its decision. *Cf. Burnet* v. *Guggenheim*, 288 U.S. 280, 288 (1933); *Cheng Fan Kwok* v. *Immigration and Naturalization Service*, 392 U.S. 206, 215 (1968).

We submit that where there is reasonable doubt that the Congress wrote a statute necessarily entailing results such as those which flow from the D.C. Circuit's interpretation, some liberty of construction is available to avoid injury to the courts and the postal ratemaking authorities. The untoward effects of a statutory construction that would place the judiciary as a final ratemaking authority can appropriately be weighed in determining congressional intent.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

IAN D. VOLNER
Counsel of Record
RICHARD M. SCHMIDT, JR.
N. FRANK WIGGINS
MARK L. PELESH
COHN AND MARKS
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 293-3860
Counsel for Recording Industry Association of America and Association of American Publishers

Intervenor's Brief

Office - Supreme Court, U.S.
FILED
JUL 8 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF FOR INTERVENOR DIRECT MAIL/MARKETING ASSOCIATION, INC.

DANA T. ACKERLY
Counsel of Record
CHARLES LISTER
DAVID K. FLYNN
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Direct Mail/ Marketing Association, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Does the Postal Reorganization Act require that, as a minimum, each class, subclass and type of service bear all the costs that can be identified as being caused by that class, subclass or type of service?

2. Should the Commission's use of the "service related cost" methodology be upheld?

3. Does the Postal Reorganization Act prohibit the allocation by distribution keys of costs that cannot be identified as being caused by a class, subclass or type of service?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	11
I. THE ACT ESTABLISHES A TWO-TIER RATE-MAKING PROCESS	11
II. THE COMMISSION IS AUTHORIZED TO ALLOCATE "TIER ONE" COSTS AND DISTRIBUTE "TIER TWO" COSTS IN ACCORDANCE WITH STATUTORY GUIDELINES	12
III. THE ACT REQUIRES THAT, AS A MINIMUM, EACH CLASS, SUBCLASS OR TYPE OF SERVICE BEAR ALL THE COSTS THAT CAN BE IDENTIFIED AS BEING CAUSED BY THAT CLASS, SUBCLASS OR TYPE OF SERVICE	14
A. The Statutory Language Denotes Causality, Without Limiting The Manner In Which Causality May Be Identified	16
B. The Legislative History Supports A Broad Definition Of "Direct And Indirect Attributable Costs"	18
1. The Foster Associates Study and the Kappel Report	19
2. The Development of Postal Cost Accounting Systems	22
3. Legislative Hearings, Bills, Reports and Debates	23
C. "Tier One" Costs Are Not Limited To Volume-Variable Costs	26
1. The House Statements Do Not Reflect the Intent of Congress	28
2. The House Statements Have Been Rejected by the Postal Rate Commission and by the Postal Service	30
D. "Tier One" Costs Include Causally-Related Costs Only	33
IV. THE COMMISSION'S USE OF THE SERVICE-RELATED-COST METHODOLOGY SHOULD BE UPHELD	36
A. The SRC Methodology Comports With The Requirements Of The Act	37

Table of Contents Continued

Page

B. The Governors' Rejection Of The SRC Methodology Is Irrelevant To This Case 37

C. The SRC Methodology Is Supported By Substantial Evidence Of Record 40

V. Costs That Cannot Be Identified As Being Caused By A Particular Class, Subclass Or Type Of Service Are To Be Distributed Judgmentally Based On Value-Of-Service And Other Factors 40

CONCLUSION 46

APPENDIX A — Selected Portions of Report of President's Commission on Postal Organization ("Kappel Report")

APPENDIX B — Selected Portions of Report to President's Commission on Postal Organization, Annex II to Kappel Report ("Foster Associates Study")

TABLE OF AUTHORITIES

CASES: Page

Ass'n of American Publishers, Inc. v. *United States Postal Serv.*, 485 F.2d 768 (D.C. Cir. 1973) 12, 19

Barber v. *Gonzales*, 347 U.S. 637 (1954) 16

Benson v. *General Services Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969) . 29

Consumers Union v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969) 30

Davidson v. *Gardner*, 370 F.2d 803 (6th Cir. 1966), *as amended* March 7, 1967) 30

Department of Air Force v. *Rose*, 425 U.S. 352 (1976) 30

Direct Mail Advertising Ass'n, Inc. v. *United States Postal Serv.*, 458 F.2d 813 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972) 41

National Ass'n of Greeting Card Publishers v. *United States Postal Serv.*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ..... 8, *passim*

National Ass'n of Greeting Card Publishers v. *United States Postal Serv.*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) ..... 8, *passim*

Newsweek, Inc. v. *United States Postal Serv.*, 663 F.2d 1186 (2d Cir. 1981), *cert. granted*, 72 L. Ed. 2d 439 (1982) ..... 2, *passim*

New York v. *United States*, 331 U.S. 284 (1947) 37

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294 (1933) 30

Soucie v. *David*, 448 F.2d 1067 (D.C. Cir. 1971) 30

Time, Inc. v. *United States Postal Serv.*, Docket Nos. 81-4183 *et al.* (2d Cir., *filed* Sept. 30, 1981) 6, 45

Udall v. *Tallman*, 380 U.S. 1 (1965) 31

United Parcel Serv., Inc. v. *United States Postal Serv.*, 604 F.2d 1370 (3d Cir. 1979) 12

Vaughn v. *Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) 30

Watt v. *Alaska*, 451 U.S. 259 (1981) 31

STATUTES:

Postal Reorganization Act, 39 U.S.C. §§ 101 *et seq.*

39 U.S.C. § 202 3

39 U.S.C. § 3622 ..... 5, *passim*

Table of Authorities Continued

Page

39 U.S.C. § 3624 38
39 U.S.C. § 3625 3
39 U.S.C. § 3641 3

LEGISLATIVE MATERIALS:

Bills:

H.R. 11750, 91st Cong., 1st Sess. (1969) 12, 24
H.R. 17070, 91st Cong., 2d Sess. (1970) 24
S. 3613, 91st Cong., 2d Sess. (1970) 25
S. 3842, 91st Cong., 2d Sess. (1970) 25, 43

Reports:

H.R. Rep. No. 988, 91st Cong., 2d Sess. (1970) 43
H.R. Rep. No. 1104, 91st Cong., 2d Sess. (1970) 14, 24, 42
H.R. Rep. No. 1363, 91st Cong., 2d Sess. (1970) .. 12, 26, 27, 28
S. Rep. No. 912, 91st Cong., 2d Sess. (1970) 13, 14, 15, 25, 38, 44

Debates:

116 Cong. Rec. 21712 (1970) 15
116 Cong. Rec. 26957 (1970) 43
116 Cong. Rec. 26962 (1970) 12, 13
116 Cong. Rec. 26966 (1970) 27
116 Cong. Rec. 27598 (1970) 13
116 Cong. Rec. 27604 (1970) 13
116 Cong. Rec. 27605 (1970) 13, 14
116 Cong. Rec. 27606 (1970) 29, 42

Hearings:

Post Office Reorganization: Hearings Before The Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 1st Sess. (1969) 18, 20, 24

Postal Modernization: Hearings Before The Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. (1969) 12, 15, 18, 25, 37

Postal Rates and Revenue and Cost Analysis: Hearings Before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 2d Sess. (1970) 23

Table of Authorities Continued

Page

Miscellaneous:

H.R. Calendars, 91st Cong. (1970) 27

President's Message to Congress Relating to Reform of the Nation's Postal System, H.R. Doc. No. 121, 91st Cong., 1st Sess. (1969) 43

ADMINISTRATIVE DECISIONS:

PRC Dkt. No. R71-1, Initial Decision of the Chief Examiner (Feb. 3, 1972) 27

PRC Dkt. No. R71-1, Opinion and Recommended Decision of the Postal Rate Commission (June 5, 1972) 31

PRC Dkt. No. R74-1, Initial Decision of the Administrative Law Judge (May 28, 1975) 34

PRC Dkt. No. R74-1, Opinion and Recommended Decision of the Postal Rate Commission (Aug. 28, 1975) 32, 35

PRC Dkt. No. R76-1, Opinion and Recommended Decision of the Postal Rate Commission (June 30, 1976) 32, 44

PRC Dkt. No. R77-1, Opinion and Recommended Decision of the Postal Rate Commission (May 12, 1978) 45

PRC Dkt. No. R80-1, Opinion and Recommended Decision of the Postal Rate Commission (Feb. 19, 1981) ..... 2, passim

PRC Dkt. No. R80-1, Decision of the Governors of the United States Postal Service (March 10, 1981) 2, 3, 41

PRC Dkt. No. R80-1, Opinion and Recommended Decision Upon Reconsideration of the Postal Rate Commission (June 4, 1981) 6, 10, 38, 39, 40

PRC Dkt. No. R80-1, Decision of the Governors of the United States Postal Service (June 29, 1981) 6

PRC Dkt. No. R80-1, Opinion and Recommended Decision Upon Further Reconsideration of the Postal Rate Commission (Sept. 17, 1981) 6

PRC Dkt. No. R80-1, Decision of the Governors of the United States Postal Service (Sept. 30, 1981) 6, 39

MISCELLANEOUS:

82 C.J.S., *Statutes* § 329 16

K. Davis, *Administrative Law Treatise* (1970 Supp.) 30

Memorandum of the United States Postal Service (May 19, 1980) 14, 15, 19

Table of Authorities Continued

Page

POD Bureau Order No. 27 (May 7, 1969) 22

Rates and Rate-making: A Report to the President's Commission on Postal Organization, Annex II to the Kappel Report (Foster Associates Study) (1968) ..... 15, *passim*

Towards Postal Excellence: The Report of the President's Commission on Postal Organization (Kappel Report) (1968) ..... 15, *passim*

Webster's New International Dictionary (2d Ed., 1954) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1304 and 81-1381

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

BRIEF FOR INTERVENOR DIRECT MAIL/MARKETING ASSOCIATION, INC.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 663 F.2d 1186 and is reproduced in Appendix A to the petition for certiorari in No. 81-1304. The Decision of the Governors of the United States Postal Service, dated March 10, 1981, and the Opinion and Recommended Decision of the Postal Rate Commission, dated February 19, 1981, are not officially recorded. The Governors' Decision is reproduced in Appendix B to the petition for certiorari.

JURISDICTION

The Opinion of the Court of Appeals was issued on November 2, 1981. A timely petition for rehearing was denied on January 11, 1982. Petitions for certiorari were filed within ninety days of the denial of the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The pertinent parts of the Postal Reorganization Act of 1970, as amended (the "Act"), 39 U.S.C. §§ 101 *et seq.*, including, in particular, 39 U.S.C. § 3622(b)(3), are reproduced in Appendix C to the petition for certiorari.

STATEMENT OF THE CASE

This case presents for review a decision of the United States Court of Appeals for the Second Circuit, which affirmed in part a Decision of the Governors of the United States Postal Service (the "Postal Service" or "USPS"), dated March 10, 1981 (the "First Decision"), and remanded the matter "for further consideration in light of this opinion."[1] The First Decision was based upon an Opinion and Recommended Decision, dated February 19, 1981 (the "First RD"), made by the Postal Rate Commission

---

[1] *Newsweek, Inc.* v. *United States Postal Serv.*, 663 F.2d 1186, 1211 (2d Cir. 1981), *cert. granted*, 72 L.Ed.2d 439 (1982) (hereinafter the "*Newsweek*" decision), reproduced as Appendix A to the petition for certiorari in No. 81-1304. In addition to the Appendices to the petition for certiorari (hereinafter "Pet. App."), portions of the record below are reproduced in the Joint Appendix (hereinafter "J.A.") and in the Joint Appendix prepared for the Second Circuit (hereinafter "2d Cir. App."), which has been filed with this Court. In addition, for the convenience of the Court, relevant portions of legislative history items not generally available have been reproduced as appendices to this brief (hereinafter "DMMA App.").

(the "Commission" or "PRC") following extensive hearings in Docket No. R80-1 pursuant to Sections 3621-3624 of the Act. 39 U.S.C. §§ 3621-24. Even though the Governors disagreed with important aspects of the Commission's reasoning,[2] the lawfulness of the March Rates[3]

---

[2] The Governors, who consist of the nine presidentially appointed members of the USPS Board of Governors, 39 U.S.C. § 202, are given specific authority under Section 3625 of the Act to receive and act upon recommended decisions of the Postal Rate Commission. The Governors have limited options: they may "approve," "allow under protest," "reject," or (under certain circumstances) "modify" a PRC recommended decision. 39 U.S.C. § 3625.

The Governors did not "approve" the First RD. They decided that the Commission had understated the total "revenue requirement." First Decision 9 (Pet. App. 8b). The Governors also decided that service-related costs was not a proper rate-making methodology. *Id.* at 14 (Pet. App. 12b). Nevertheless, the Governors, stating a need for additional revenues as soon as possible, allowed most of the Commission's recommendations to go into effect "under protest" and returned the First RD to the Commission for reconsideration. *Id.* at 1 (Pet. App. 1b).

[3] The rates that were "allowed under protest" will be referred to as the "March Rates." The March Rates include rates for most of the classes of mail, including a first-class stamp of 18 cents.

The Governors implemented changes for the remaining classes of mail under their "temporary" rate authority. 39 U.S.C. § 3641; *see* First Decision 17 (Pet. App. 15b). Some of the Commission's rate recommendations had been based upon recommended changes in the classification schedule that the Governors rejected. For the affected subclasses, which included third-class bulk-rate regular ("BRR") mail, the Governors had not been presented with recommendations that corresponded with the applicable classification requirements. Accordingly, the Governors utilized their "temporary" rate authority to implement rates other than those recommended by the Commission. Legal challenges to these "temporary" rates were raised in district court proceedings, and some related issues were raised in connection with the appeal below. *See Newsweek*, 663 F.2d at 1206-07. None of the issues involved in the status of the "temporary" rates is before this Court at the present time.

depends upon the First RD under the Act's unique rate-making scheme.

Direct Mail/Marketing Association, Inc. ("DMMA") is a trade association with over 2,600 member companies. Although they utilize all classes of mail, DMMA's members are united in their interest in the rates for third-class bulk-rate regular ("BRR") mail. DMMA intervened and actively participated in Docket No. R80-1 before the Postal Rate Commission and in the *Newsweek* appeal before the Second Circuit. Although the rates for BRR mail are not directly involved in this appeal, DMMA respectfully submits this brief because of the fundamental importance of the issues pending before this Court.

The First RD followed the same, basic postal rate-making steps that had been utilized in the previous four general rate cases under the Act.[4] Briefly stated, the Commission's analysis began with an estimate of the costs that the Postal Service would accrue in the test year in each of twenty "cost segments."[5] The burden of paying this total "revenue requirement" was then apportioned among the various classes and subclasses of mail using two basic techniques. First, the costs of some segments

---

[4] The records of these proceedings will be cited as follows: "PRC Dkt. No. R71-1," "PRC Dkt. No. R74-1," "PRC Dkt. No. R76-1" and "PRC Dkt. No. R77-1." If not otherwise indicated, citations to PRC records will be to the record below, in Docket No. R80-1.

[5] Each segment corresponds roughly to a major function performed by the Postal Service in processing the mail, *e.g.*, clerks, carriers, transportation and building occupancy. For analytical purposes, many of these segments are further divided into a number of subsegments, *e.g.*, carrier in-office time, carrier street time, carrier delivery time. The cost segments are shown at J.A. 64a-71a.

or portions thereof were identified as causally related and were allocated to the responsible classes and subclasses of mail using various ratios or "distribution keys," such as relative number of pieces in each class, relative total weight of each class, and the like. The remainder of the costs were then aggregated as "residual" costs and distributed among the classes in the discretionary exercise of the Commission's expert judgment, applying the "non-cost factors" enumerated in Sections 3622(b)(1), (2), (4)-(9).[6] The results of this second, or "pricing," process were measured in terms of relative "cost coverage," which is the ratio of total revenue burden of a class of mail to its allocated costs, expressed as a percentage.

In order to determine how a particular type of cost should be treated, the Commission adopted a set of principles in the form of definitions of basic rate-making terms (the "Basic Definitions").[7] In accordance with the Basic Definitions, the Commission identified two types of costs that it allocated using distribution keys. First, the Commission allocated "attributable" costs, which it defined as those costs that varied with "volume" over the "short run" or over the "longer run."[8] Second, the Commission

---

[6] 39 U.S.C. §§ 3622(b)(1), (2), (4)-(9). Technically, "residual" costs are distributed to the classes after deductions have been made to account for public service appropriations and investment income.

[7] The Basic Definitions, set forth at First RD 118-41, are fundamental to the postal rate-making process, because they provide the criteria for determining the treatment of each group of costs.

[8] First RD 138-40. Attributable costs also included a small amount of "specific fixed" costs, which are fixed costs incurred for the benefit of a single class. References in this brief to the characteristics of "attributable" costs will occasionally omit, for the sake of brevity, mention of "specific fixed" costs. The inclusion of specific fixed costs in the computation of "attributable" costs has never produced controversy, and the amounts involved are relatively minor. The only

(footnote continues)

allocated "assignable" costs, which were defined as those costs that varied with a "mail characteristic" other than volume. First RD 116-17, 138-40. Because both "attributable" and "assignable" costs vary with certain parameters, the Commission found that they can be identified, as a logical matter, as being caused by those classes of mail that produce variations in these parameters. "Service-related costs," which were determined to vary with the provision of preferential delivery service, were found to be one type of "assignable" costs, and were allocated to the preferential classes of mail. First RD 145.

Petitions for review of the March Rates were filed in the Second Circuit, which rendered its decision on November 2, 1981, remanding the case for further proceedings.[9] On April 19, 1982 this Court granted peti-

---

(footnote continued)
specific fixed costs ever allocated in a postal rate case have been the fixed costs utilized solely for various special services. *See* First RD 222.

[9] *Newsweek*, 663 F.2d at 1211. This remand had no immediate impact upon postal rates, because effective November 1, 1981 the Governors had instituted further increases in postal rates under their "modification" authority under 39 U.S.C. § 3625(d). In their First Decision, the Governors had returned the PRC's First RD for reconsideration pursuant to Section 3625(c)(2). The PRC reconsidered the matter and issued an Opinion and Recommended Decision Upon Reconsideration (the "Second RD") on June 4, 1981. The Governors issued a second Decision (the "Second Decision") on June 29, 1981, rejecting the Second RD and again returning the case to the Commission. The Commission issued its Opinion and Recommended Decision Upon Further Reconsideration (the "Third RD") on September 17, 1981, and on September 30, 1981 the Governors issued a third Decision (the "Third Decision") that was dated September 29, 1981. Pursuant to the Third Decision, increases in postal rates were imposed effective November 1, 1981. The validity of these rates (the "November Rates") is currently being challenged before the Second Circuit in *Time, Inc.* v. *United States Postal Serv.*, Docket Nos. 81-4183 *et al.* (2d Cir., *filed* September 30, 1981) (the "*Time* appeal").

tions for certiorari filed by National Association of Greeting Card Publishers ("NAGCP") and United Parcel Service of America, Inc.

SUMMARY OF ARGUMENT

The court below was correct in many of its holdings. It correctly found that the Act creates a two-tier, and not a three-tier, rate-making process. *Newsweek*, 663 F.2d at 1196. It correctly upheld, although partially for the wrong reasons, the Commission's use of the service-related-cost methodology. [10]

The *Newsweek* court erred, however, in resolving the single most important issue before it: the meaning of the phrase "direct and indirect attributable costs" in 39 U.S.C. § 3622(b)(3). This issue determines the legal parameters for the establishment by the Commission of its various cost accounting techniques. Therefore, this issue determines those USPS costs that are to be "costed," *i.e.*, allocated among the classes using "distribution keys," and those remaining costs that are to be "priced," *i.e.*, distributed among the classes in the Commission's discretionary application of the non-cost factors of Section 3622(b).

Under *Newsweek*, the discretionary aspect of postal pricing would be greatly expanded, with allocated costs being limited to short-run volume-variable costs plus "specific fixed" costs. *Newsweek*, 663 F.2d at 1198-1201. Under prior decisions of the District of Columbia Circuit,

---

[10] The court correctly found that SRC "is not an unreasonable methodology to use in assigning costs." *Newsweek*, 663 F.2d at 1202-03. However, the court incorrectly held that SRC could be used in distributing "tier two" costs. *Newsweek*, 663 F.2d at 1202. Under the proper interpretation of the Act, SRC is a subcategory of "direct and indirect attributable costs." *See* discussion pp. 9-10, 37 *infra*.

on the other hand, the discretionary aspect of postal pricing would be greatly reduced, with both "attributable" costs and "reasonably assignable" costs being allocated using any "reasonable" distribution key.[11] Under *NAGCP I*, accounting-type allocations would be made even though no causal connection could be established between costs and the particular class of mail to which such costs might be allocated. *NAGCP I*, 569 F.2d at 585-90.

Neither *Newsweek* nor *NAGCP I* properly reflects the intent of Congress. The *NAGCP I* decision erred in discovering a third, "middle" tier of costs that could be allocated using any "reasonable" distribution key. Congress did not intend to "maximize the use of cost-of-service principles," as that term was understood by the *NAGCP I* court.[12] On the other hand, the *Newsweek*

---

[11] *National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 569 F.2d 570 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) *("NAGCP I"); National Ass'n of Greeting Card Publishers* v. *United States Postal Serv.*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) *("NAGCP III")*.

[12] *NAGCP I*, 569 F.2d at 590. The term "cost-of-service principles" has been used with a lamentable lack of precision. The *NAGCP I* court appeared to use the phrase to refer to accounting-type costing allocations independent of the notion of causality:

> "Simply put [reasonable] means that all reasonable efforts must be made to assign unattributed costs to the various classes of mail and service by use of acceptable cost-of-service estimates rather than to allocate them discretionarily as residual costs." 569 F.2d at 589, n.74.

On the other hand, NAGCP in its petition for certiorari has offered the following definition:

> "Allocation on a cost-of-service basis denotes that the costs caused by the particular class of mail are to be allocated, for pricing purposes, to that class." NAGCP Petition, p. 5, n.11.

(footnote continues)

court erred in defining the first, or "attributable cost," tier too narrowly. Congress did not intend that "attributable" costs be limited to short-run volume-variable costs plus specific fixed costs. Indeed, Congress did not intend to impose on the Commission any specific cost accounting techniques whatsoever.

Congress' intent with regard to cost allocations was that each class, subclass or type of service bear all those costs that can be identified (through any logical analysis) as being caused by that particular class, subclass or type of service. Congress delegated to the Commission the responsibility of implementing this general goal.

The Basic Definitions articulated in the First RD accurately reflect the intent of Congress. Indeed, they represent the most significant advance in postal ratemaking methodology since the passage of the Act over a decade ago. Both "attributable" and "assignable" costs, as defined by the Commission, are proper subcategories of the statutory term "direct and indirect attributable costs," because they can be identified as having been caused by one class or subclass of mail or a type of mail

---

(footnote continued)

The confusion was enhanced by the admission by the *NAGCP I* court that the distinction between attributable and assignable costs was one of degree:

> "While both attributable and assignable costs, as used in subsection 3622(b)(3), involve inferences of causation, the latter concept permits a greater degree of estimation and connotes somewhat more judgment and discretion than the former." 569 F.2d at 587, n.59.

In light of the above, the *NAGCP III* court was correct in stating that the distinction made by *NAGCP I* between attribution and assignment was "rather murky." *NAGCP III*, 607 F.2d at 406.

service. [13] "Service-related costs" are a proper subcategory of "assignable" costs, because, although they are "fixed" and do not vary with "volume," [14] they do vary with the capacity needed to provide preferential services to the preferential classes. [15]

The court below also erred in concluding that "cost factors" could be taken into account in the pricing process. *Newsweek*, 663 F.2d at 1202. Causally-related costs must be borne by the responsible class. The Commission

---

[13] The word "assignable" has been used with several different meanings. The Commission in Docket No. R77-1 did not, in fact, allocate any costs using merely "reasonable" distribution keys. The Commission sought to comply with the *NAGCP I* requirements by utilizing a three-tier analysis, but it "reasonably assigned" only those non-volume-variable costs for which causal relationships could be identified. Thus, it was able to utilize a three-tier process without allocating non-causally-related costs. The *NAGCP III* court affirmed.

As the Commission stated in its First RD:

> "The court of appeals' acceptance in *NAGCP III* of our R77-1 costing techniques indicates that it is possible to develop an economically rational costing approach while working within the constraints of *NAGCP I*." First RD 111.

As a result, while the Act uses the term "assignable" to refer to the judgmental process by which the "tier two" costs are distributed to the classes, and while the *NAGCP I* court used the term to apply to the allocation of costs utilizing a "reasonable" distribution key, the Commission has used the term to apply to costs that vary with a parameter of cost causation other than volume. First RD 138-40. As defined by the Commission, "assignable" costs are not a subcategory of the statutory "reasonably assignable" costs, but are a subcategory of the statutory "direct and indirect attributable costs."

[14] For precise definitions of "fixed" and "volume," *see* First RD 137-38, 123-27.

[15] *See* First RD 145; *NAGCP III*, 607 F.2d at 404-12; *see also* Second RD 67-115.

does not have the discretion to distribute them to another class.

Finally, this Court should hold that residual costs that are not "direct [or] indirect attributable costs" must be judgmentally distributed in the manner used by many businesses, utilizing value-of-service principles and taking into account the other non-cost factors enumerated in Section 3622(b).

ARGUMENT

I. .The Act Establishes A Two-Tier Rate-Making Process

The *Newsweek* opinion was clearly correct in holding that Section 3622(b)(3) establishes a two-tier, and not a three-tier, rate-making process. *Newsweek*, 663 F.2d at 1196. There is no language in the statute, "plain" or otherwise, to the effect that the computation of "that portion of all other costs of the Postal Service reasonably assignable . . ." is to be carried out on a "cost-of-service" basis. *Contra NAGCP I*, 569 F.2d at 586. Indeed, one searches in vain throughout the legislative history for mention of a three-step rate-making process; the discussions are consistently framed in two, and not three, parts. [16]

At the same time, there is no basis for concluding that Congress intended to prohibit the Commission from utilizing as many steps in the rate-making process as it might deem analytically useful.

To focus on the number of "tiers," however, is to distract attention from the critical issues, which are: First, to determine the legal parameters for defining those costs that are to be allocated on a distribution-key basis; and, second, to determine the legal parameters for the distribution of the remaining costs.

---

[16] The legislative history is discussed in detail at pp. 18-28 *infra*.

II. The Commission Is Authorized To Allocate "Tier One" Costs And Distribute "Tier Two" Costs In Accordance With Statutory Guidelines.

The *NAGCP I* and *Newsweek* decisions are correct in holding that the Commission is given discretion in applying the statutory principles set forth in Section 3622(b). [17]

Congress understood that postal rate-making in accordance with proper, economic principles would be a complex process, [18] and it created the Commission as an independent establishment of the executive branch to assume responsibility for this task. [19] From statements

---

[17] Both the *NAGCP I* and the *Newsweek* decisions are correct in holding that the Commission is the body to whom Congress delegated the authority to implement the statutory standards. *NAGCP I*, 569 F.2d at 576, 592-93; *Newsweek*, 663 F.2d at 1190; *see also NAGCP III*, 607 F.2d at 401, 404; *United Parcel Serv., Inc.* v. *United States Postal Serv.*, 604 F.2d 1370, 1381 (3d Cir. 1979); *Ass'n of American Publishers, Inc.* v. *United States Postal Serv.*, 485 F.2d 768, 777 (D.C. Cir. 1973) (Bazelon, C.J., concurring). This Court should explicitly affirm the holdings below, leaving no room for doubt that the Congress intended the Commission, not the Postal Service, to be the expert body on costing and pricing issues.

[18] For further discussion of some of these complexities, *see* discussion pp. 19-23, 28, n.63 *infra*.

[19] The Congress rejected the early Administration proposal for a panel of three rate commissioners within the Postal Service in favor of a fully independent commission. *Compare* H.R. 11750, 91st Cong., 1st Sess. § 1251 (1969) *with* H.R. Rep. No. 1363, 91st Cong., 2d Sess. 85 (1970). Senator McGee said, in explaining the conference report to the Senate, ". . . [T]he Senate felt very strongly about the key to reorganization resting in the independence of a professional rate board, a rate commission. Again, at the end of very lengthy give and take, the Senate prevailed in that independence. . . ." 116 Cong. Rec. 26962 (Aug. 3, 1970). Even under the Administration's proposal, the rate commissioners were to have substantial independence. Postal Modernization: Hearings Before the Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. 510 (1969) (remarks of Postmaster General Blount).

made to both the House and Senate, there can be no doubt that Congress intended the Commission to be the expert, "professional" agency to exercise the judgment necessary to resolve the myriad issues involved in the setting of postal rates. As Congressman Udall said in a detailed statement to the House:

> "From the very beginning, there was widespread agreement between House and Senate conferees that Congress should lay down broad policy guidelines and that we leave the application of those policies to full-time professional rate commissioners." [20]

In a similar vein, Senator McGee stated:

> "[T]he commission has specific and complete jurisdiction within the confines of its jurisdiction—namely that it produce the necessary revenue to meet the costing of the new Postal Service within the bounds defined by the bill. [21]

Congress also realized that postal costing and pricing methodologies were in an early stage of development and expected more sophisticated and precise techniques to evolve over time. [22] It would not have been feasible to legislate the parameters for the systems that Congress expected to be developed in future years.

---

[20] 116 Cong. Rec. 27605 (Aug. 6, 1970) (remarks of Cong. Udall). *See also* 116 Cong. Rec. 27598 (Aug. 6, 1970) (remarks of Cong. Dulski) (". . . [W]e expect [the commission] to be composed of experts."); *id.* at 27604 (remarks of Cong. Udall) ("we have delegated to impartial professionals in a new postal rate commission the job of coming up with the right rates to meet those congressional guidelines and standards.")

[21] 116 Cong. Rec. 26962 (Aug. 3, 1970) (remarks of Sen. McGee); S. Rep. No. 912, 91st Cong., 2d Sess. 13 (1970).

[22] In Congressional hearings, postal officials referred to the "first attempt" character of the initial Revenue and Cost Analysis and to their plans to expand the reach of the costing system in the future. *See* discussion pp. 22-23 *infra*.

For all of these reasons, Congress committed the rate-making power to the Commission's discretion, subject to broad guidelines,[23] including two parameters of primary importance. First, Congress intended the Commission to seek to identify, and to allocate to the responsible classes, all those costs caused in providing service to a particular class, subclass or type of service. Second, Congress intended that those costs that cannot be so identified were not to be allocated with any "accounting-type" method; rather, they were to be distributed in the Commission's judgment, using value-of-service pricing concepts and applying the other enumerated non-cost factors.[24]

III. The Act Requires That, As A Minimum, Each Class, Subclass Or Type Of Service Bear All The Costs That Can Be Identified As Being Caused By That Class, Subclass Or Type Of Service.

The postal reform movement of the late 1960's was spurred by a widespread perception that an undue degree of discretion in postal rate-making made possible improper cross-subsidization of some classes of mail.[25] Thus, it was a central and express aim of both Houses of Congress to end the possibility for such abuses—to get "politics out of the Post Office."[26] In order to insure that future rate-

---

[23] *Accord Newsweek*, 663 F.2d at 1198.

[24] *See* Memorandum of the United States Postal Service 13-17 (May 19, 1980) (R. 24129-133) (J.A. 263a-67a).

[25] *See generally NAGCP I*, 569 F.2d at 587.

[26] *NAGCP I*, 569 F.2d at 588, *quoting*, H.R. Rep. No. 1104, 91st Cong., 2d Sess. 6 (1970); *accord Newsweek*, 663 F.2d at 1198; *see also NAGCP III*, 607 F.2d at 398 (the intent of Congress was "to reduce the subjectivity inherent in the political rate-making process that prevailed before the enactment of the Act. . . ."); S. Rep. No. 912, 91st Cong., 2d Sess. 8 (1970); 116 Cong. Rec. 27605 (Aug. 6, 1970) (remarks of Cong. Udall).

making did not result in cross-subsidization, Congress sought to avoid the setting of any rate below the actual costs of providing the service.[27] Congress also realized that the cost accounting system then being used, the Cost Ascertainment System, did not even purport to determine what it actually cost to provide services to each of the classes of mail.[28]

The Report of the President's Commission on Postal Organization (the "Kappel Report")[29] had a very significant influence on the legislative process at all stages.[30] The rate-making sections of the Kappel Report were, in turn, based on a study prepared by Foster Associates, Inc. (the "Foster Associates Study").[31] The Foster Associates Study proposed costing and pricing concepts that were adopted by the Kappel Commission and embodied without substantial change in the Act.

---

[27] *See, e.g.*, S. Rep. No. 912, 91st Cong., 2d Sess. 10 (1970); *see also* 116 Cong. Rec. 21712 (June 26, 1970) (remarks of Sen. McGee).

[28] *See, e.g.*, Postal Modernization: Hearings Before the Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. 505-507 (1969) (testimony of Postmaster General Blount).

[29] *Towards Postal Excellence:* The Report of the President's Commission on Postal Organization (June 1968).

[30] *See Newsweek*, 663 F.2d at 1200, n.10; *accord*, Memorandum of the United States Postal Service 14-16 (May 19, 1980) (R. 24130-32) (J.A. 264a-65a).

[31] *Rates and Rate-making:* A Report to the President's Commission on Postal Organization, Annex II to the Kappel Report, (June 1968). For the convenience of the Court, certain relevant portions of the Kappel Report and the Foster Associates Study have been reproduced in the Appendices to this brief, which will be cited as "DMMA App."

A. The Statutory Language Denotes Causality, Without Limiting The Manner In Which Causality May Be Identified.

The relevant statutory language, contained in 39 U.S.C. § 3622(b), provides that:

> "(b) Upon receiving a request, the Commission shall make a recommended decision on the request for changes in rates or fees in each class of mail or type of service in accordance with the policies of this title and the following factors:
>
> * * *
>
> (3) the requirement that each class of mail or type of mail service bear the direct and indirect postal costs attributable to that class or type plus that portion of all other costs of the Postal Service reasonably assignable to such class or type." 39 U.S.C. § 3622(b).

The phrase "attributable costs" is not a term of art in either the accounting or the rate-making field. Thus, under the normal rules of statutory construction the usual and commonly understood meaning of a term is to be employed.[32] Webster's New International Dictionary 179 (2d Ed., 1954), defines the common meaning of the verb "attribute," from which is derived the adjective "attributable," as follows:

> "2. to ascribe (to) as belonging or pertaining; specif.: a. By way of cause; as, a disease attributed to infection. 'We attribute to magnificence what was really the effect of . . . necessity.' Macaulay. b. By way of inherent quality; as, to attribute magical power to a charm. c. By way of interpretation; as, a meaning attributed to a passage. d. By way of authorship or achievement; as, a poem attributed to

---

[32] *Barber* v. *Gonzales*, 347 U.S. 637, 641 (1954); 82 C.J.S. *Statutes* § 329, at 639-645.

Spenser. e. By way of classification; as, a handwriting attributed to the 2d century."

According to this definition, "attribute" is clearly a term of wide applicability. There is no suggestion of any restriction upon the manner or modality of the "belonging" which may properly be described by it.

At the same time, Congress by-passed a number of terms, such as "incremental costs," which had commonly understood and fairly specific meanings in the fields of cost accounting and economics, and with which Congress had become familiar. The Foster Associates Study and the Kappel Report had been couched largely in the language of economic theory and had used phrases such as "marginal costs," "incremental costs," "cost constraint" and many similar terms of art. When it came to drafting legislation, however, Congress utilized other, more general, terms to express the intended characteristics of the "rate floor." Thus, the House Bills, H.R. 11750 and H.R. 17070, utilized the phrase "demonstrably related costs" and the Senate Bills, S. 3613 and S. 3842 used the phrases "properly attributable" and "properly allocable" costs.[33] The statute uses the term "attributable" costs.

The inclusion of the words "direct" and "indirect," which do have technical significance,[34] adds to the breadth of the concept.

---

[33] *See generally* discussion pp. 23-26 *infra*.

[34] *See generally* Foster Associates Study at 3-28 to 3-36 (DMMA App. 2b-10b). "Indirect" costs had been described in the Foster Associates Study as those costs which "relate to activities carried on for the common benefit of a number of classes, or of the whole enterprise." Foster Associates Study at 3-30 (DMMA App. 4b). The Study went on to state that "the indirect costs with which we are concerned are typically variable with changes in output of any one of the services; but that variation is almost never in proportion with the

(footnote continues)

The plain implication of Congress' choice of phraseology is that, if a cost can be identified as being caused by a particular class of mail, regardless of whether the cost may be direct or indirect and regardless of the analytical process by which that causal relationship is identified, the responsible class should bear it. [35]

B. The Legislative History Supports A Broad Definition Of "Direct And Indirect Attributable Costs."

This interpretation is fully supported by the legislative history. The Kappel Commission and both Houses of Congress wished to assure that each class would, as a minimum, "pay its own way," a goal that would be realized if each class were to bear the costs that it caused. [36] There simply was no exception in the legislative history to the proposition that no class should bear the costs caused by any other class. Therefore, the tracing of

---

(footnote continued)
amount of use." *Id.* at 3-31 (DMMA App. 5b). The Study also stated that there is "no simple relationship between changes in the volume of any one of the services and the quantities and costs of resources required to produce them." *Id.; see also id.* at 5-21.

[35] Even a cursory review of the Foster Associates Study reveals Congress' wisdom in stating a general principle and delegating to experts the technical aspects of determining cost responsibility. The appropriate economic principles were complex and difficult, to say the least; it would have been totally impractical to define in legislation a system to apply these principles. *See generally* Foster Associates Study 3-30 to 3-35 (DMMA App. 4b-9b).

[36] Foster Associates Study 3-35, 3-36 (DMMA App. 9b-11b); Kappel Report 130-132 (DMMA App. 6a-9a); *see also* Postal Modernization: Hearings Before the Committee on Post Office and Civil Service, United States Senate, 91st Cong., 1st Sess. 508-509 (1969); Post Office Reorganization: Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 1st Sess. 507-508 (1969) (remarks of Cong. Tiernan).

causally related costs " 'was to be carried out *as far as it reasonably could be.*' "[37]

1. The Foster Associates Study and the Kappel Report.

The Kappel Report was influential in the Congressional deliberations[38] and laid the conceptual foundation for the rate-making provisions of the Act. The rate-making portions of the Kappel Report were, in turn, based upon the Foster Associates Study.

The Postal Service argued to the Commission below that the Kappel Report advocated concepts of "variable costs and of demand pricing."[39] The Postal Service's argument is based upon the use of the term "long run variable costs" by the Kappel Report.[40] The Postal Service seemed to believe that this phrase meant "long run *volume* variable costs."[41] A close reading of the relevant discussion, however, leaves no doubt that the Kappel Report intended to refer to costs variable with volume *or with any other parameter of cost causation.*

The Foster Associates Study had defined a term it called variously "marginal costs" or "long run marginal costs" and had espoused a "marginal cost constraint" for

---

[37] *Ass'n of American Publishers, Inc.* v. *United States Postal Serv.*, 485 F.2d 768, 779, n.17 (D.C. Cir. 1973) (Bazelon, C.J., concurring) (emphasis in original); *NAGCP I*, 569 F.2d at 585; *NAGCP III*, 607 F.2d at 399-400.

[38] *Newsweek*, 663 F.2d at 1200, n.10 (the Kappel Report was "influential").

[39] Memorandum of United States Postal Service 16-17 (May 19, 1980) (R. 24131-2) (J.A. 265a-66a).

[40] Kappel Report 130-32 (DMMA App. 6a-9a).

[41] Memorandum of United States Postal Service 16 (May 19, 1980) (R. 24131) (J.A. 265a), citing Kappel Report at 131-32.

the purpose of "defining lower limits to postal service rates."[42] The Study went on to state:

> ". . . [T]he quantity we have called marginal cost may express more than one mode of variation of total cost. We can expect that costs vary not only in terms of identifiable units of output, but also in terms of the service capacity required to make possible that output. Hence, marginal costs must exist with respect to variation in total costs with *both* capacity and output." Foster Associates Study 3-33 (DMMA App. 7b) (emphasis in original).

The Study went on to discuss "peak load" costs as an aspect of marginal costs, *id.* at 3-34 (DMMA App. 8b), and made clear that marginal costs should be estimated in such a way "that variability *in all dimensions in which costs can vary* can be estimated."[43]

These basic concepts were adopted by the Kappel Commission[44] and, with certain changes in terminology, incorporated into its Report. The term "demonstrably related costs," which was later incorporated into many drafts of the postal reform legislation, originated with the

---

[42] Foster Associates Study 3-35, 3-36 (DMMA App. 9b-11b).

[43] Foster Associates Study 5-14 (emphasis added); *see also id.* at 1-5 and Appendix A ("Glossary") at vi (DMMA App. 23b) ("variable costs" include costs that vary with "changes in scale of operation, output, or other parameter of variation").

[44] The views of the Foster Associates Study concerning the marginal cost constraint were expressly endorsed by Chairman Kappel during Congressional hearings on the Postal Reorganization Act:

> "We have a system that is put together in the Foster Associates report that uses the term 'long-run marginal cost.' It is a technical concept and . . . I am for it . . . ."

Post Office Reorganization: Hearings Before The Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 1st Sess. 280 (1969).

Kappel Commission and was used interchangeably with the phrase "long-run variable costs." Kappel Report 61.

The meaning of "long-run variable costs" is virtually indistinguishable from the meaning of "long-run marginal costs" used by the Foster Associates Study.[45] It was characterized by the Kappel Commission as including "all of those costs which [each class] alone causes," "the full added costs demonstrably related to that class." Kappel Report 131. Specifically, the Kappel Commission stated:

> "In economic terms, each class should bear, as a minimum, the long-run variable costs ascribable to it—the full added costs demonstrably related to that class." *Id.*

The Kappel Commission's discussion of "long-run variable costs" reveals that a concept broader than volume variability was intended. The Report states:

> "It makes no difference whether these costs are capital costs or operating costs." *Id.*

The Report also states, as an example of "variable costs," that:

> "The particular costs related to daily peak, for example, should be charged proportionately to those classes which caused the peak." *Id.* at 133.

Finally, the Kappel Report speaks of the treatment of carrier costs in a manner that foreshadows the development of the service-related cost methodology. The Kappel Report questioned the fairness of charging first-class mail and third-class mail equal proportions of carrier delivery costs,

---

[45] Compare the definitions of "long-run marginal cost" and "variable cost" contained in the Glossary to the Foster Associates Study at iv and vi, respectively. (DMMA App. 21b and 23b).

"despite the fact that first-class mail must be delivered the day the carrier receives it (even if he must work overtime to do it) while third-class mail need not be delivered until the second day." *Id.* at 130.

2. The Development of Postal Cost Accounting Systems.

The development of cost accounting systems by the Post Office Department demonstrates that postal management agreed with the costing concepts set forth in the Foster Associates Study and the Kappel Report. In May of 1969, the same month that the postal reform legislation was introduced, Assistant Postmaster General Hargrove ordered the establishment of a Task Force to institute a cost accounting system in place of the old Cost Ascertainment System. In his order the Assistant Postmaster General stated:

". . . to meet first-priority requirements, the initial stage of our work will concentrate on a program for primary use in rate making. Our immediate goal will be to produce estimates of short-run incremental costs and appropriate longer-run incremental costs in carrier costs out of the office. While limited in scope, our procedures and methods should serve as the foundation for a more comprehensive system.

* * *

"The target date for completion of the first-stage effort is December 31, 1969.

"In view of this relatively tight schedule, some data requirements (*e.g.*, peak-load attribution) may be deferred for later study. The data produced by the current effort may accordingly be approximate orders of magnitude in some instances rather than definitive estimates." [46]

---

[46] POD Bureau Order No. 27 (May 7, 1969), *reprinted in* PRC Dkt. No. R71-1 (R. 4-84, 4-85).

The first "Revenue and Cost Analysis Report" prepared by the Post Office Department in April 1970 borrowed the phrase "demonstrably related costs" from the Kappel Report:

> "*Demonstrably related costs.*—Those costs, direct or indirect, which by empirical or deductive analysis can be demonstrated (1) to vary in response to changes in volume of class, subclass, or category of service, or (2) even though fixed, to be the consequence of providing one specific class, subclass, or category of service."[47]

The Post Office emphasized that this RCA report:

> ". . . represent[s] the culmination of a long effort to bring new dimensions to postal costing and rate-making. I must emphasize however that we have not come to the end of this effort. There are many refinements and improvements still to be built into our new system. We are working on these even now."[48]

3. Legislative Hearings, Bills, Reports and Debates.

In preparing its legislative proposals, the Administration espoused the general principle of establishing a rate floor based on causally related costs and for this purpose borrowed the term "demonstrably related costs" from the Kappel Report.[49] The term appeared in H.R. 11750, in-

---

[47] Postal Rates and Revenue and Cost Analysis: Hearings Before the Subcommittee on Postal Rates of the Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 2d Sess. 75 (1970).

[48] *Id.* at 6 (testimony of Assistant Postmaster General James W. Hargrove).

[49] *Accord Newsweek*, 663 F.2d at 1199, n.8; *see* H.R. 11750, Recommendations of the President of the United States, House Comm. on Post Office and Civil Service, 91st Cong., 1st Sess. 164 (Comm. Print 1969) (analysis of Section 1201(c)).

troduced on May 28, 1969,[50] and was carried over into the subsequent House version, H.R. 17070.[51] The term was not given specific definition in the House bills and the report accompanying H.R. 17070 offers no technical elucidation.[52]

Postmaster General Blount did, however, elaborate upon the choice of the term in a document entitled "Detailed Comments on J. Edward Day's Analysis of the Rate-Making Provisions of H.R. 11750":

> "The purpose of coining the new phrase, 'demonstrably related costs,' was to avoid the confusion that has existed in the past over the meaning of such terms as 'marginal' or 'incremental' costs. Demonstrably related costs are those costs which can be traced directly to the class of service in question. The language of the bill calls for a hard, factual determination on this point, and not, as the memorandum suggests, for an exercise of 'unlimited discretion.' Again, we believe that the legislative history has made amply clear what the term means, *without shackling future generations to any particular economic theory.*"[53]

Appearing before the Senate Committee, Postmaster General Blount expressed the philosophy behind the administration's proposed legislation. After discussing the fact that first-class mail "is handled at the most expensive time, on the most expensive shift . . ." and that the "peaking of that mail causes [the Postal Service] extra costs as

---

[50] H.R. 11750, 91st Cong., 1st Sess. § 1201(c) (1969).

[51] H.R. 17070, 91st Cong., 2d Sess. § 1201(c) (1970).

[52] *See* H.R. Rep. No. 1104, 91st Cong., 2d Sess. 18-19 (1970).

[53] Post Office Reorganization: Hearings Before the Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 1st Sess. 1273 (1969) (emphasis added).

well . . .",[54] Postmaster General Blount described the concept of demonstrably related costs as including all costs traceable to the class in question:

> "The proper determination of the demonstrably related costs will take a considerable amount of work. Basically, however, such costs will include not just the direct operating costs, if you will, of handling a particular class of mail, but will include any cost, *whether institutional or otherwise*, that is directly traceable to the class of mail in question." *Id.* (emphasis added).

The bills introduced in the Senate also contained the concept of a minimum "rate floor," although the phraseology was different, employing the terms "properly attributable" costs[55] and "properly assignable" costs.[56] The concept was included as one of the rate-making "factors," but the intent that each class bear the costs that it caused was unmistakable.[57] Thus, the Senate Report on S. 3842 states that:

> ". . . No particular classification of mail is required to recover a designated portion of its cost *beyond its incremental cost.*"[58]

---

[54] Postal Modernization: Hearings Before the Committee on Post Office and Civil Service, United States Senate, 91st Cong., 2d Sess. 509 (1969).

[55] S. 3613, 91st Cong., 2d Sess. § 3703(c) (1970); and S. 3842, 91st Cong., 2d Sess. § 3703(c) (1970).

[56] S. 3842, Committee version, 91st Cong., 2d Sess. § 3704(g) (1970). At no place in any of the Senate bills nor in the Report accompanying S. 3842 were the terms "properly attributable" or "properly assignable" specifically defined. *See* S. Rep. No. 912, 91st Cong., 2d Sess. 15 (1970).

[57] *Accord* Brief For Respondent United States Postal Service at 17, 19, in *Newsweek* (2d Cir. Dkt. No. 81-4035) (1981).

[58] S. Rep. 912, 91st Cong., 2d Sess. 17 (1970) (emphasis added).

In the conference committee the House's use of the term "requirement" was adopted, but the House phrase, "demonstrably related costs," was abandoned in favor of a new phrase, "direct and indirect attributable costs." This phrase had no direct antecedent, and there is no specific indication as to why that term was chosen. [59]

Two conclusions reasonably can be drawn from the choice of final language. First, the statutory term was chosen in preference to a phrase that had actually been utilized in the newly instituted Revenue and Cost Analysis System. Therefore, the rejection of "demonstrably related costs" may be seen as Congress' attempt to emphasize a broad, general concept; its rejection eliminated any implication that Congress intended to refer to any specific accounting techniques.

Second, the introduction of the phrase "direct and indirect" implies that causal relationships were to be identified for as broad a range of costs as possible, including indirect costs as well as direct costs.

C. "Tier One" Costs Are Not Limited To Volume-Variable Costs.

In the entire legislative history there are only two references that might be cited to support an argument that Congress intended the statutory phrase "direct and indirect attributable costs" to be limited to those costs that vary with volume. Neither statement is entitled to significant weight.

After the Senate had completed its consideration of the conference report on August 3, 1970, a "Statement of the Managers on the Part of the House" (the "House Mana-

---

[59] *See* H.R. Rep. No. 1363, 91st Cong., 2d Sess. 87 (1970).

gers' Statement"), signed only by the House managers, [60] was printed as an appendix to the conference report that was circulated in the House, but not in the Senate. [61] Then, during the debate on the conference report on the House floor on August 6, 1970, Congressman Udall deli-

---

[60] H.R. Rep. No. 1363, 91st Cong., 2d Sess. 79-90 (1970). The *Newsweek* decision erroneously refers to the House Managers' Statement as the product of the "Conference Committee." *Newsweek*, 663 F.2d at 1199; *see also id.* at 1200.

[61] After examining the legislative history of H.R. 17070, Chief Examiner Wenner concluded that the House Managers' Statement was not available to the Senate when it voted to accept the conference report. PRC Dkt. No. R71-1, Initial Decision 36-38 (R. 1-8). Research confirms Mr. Wenner's conclusion. The Senate voted to accept the conference report at 3:05 p.m. on August 3, 1970. *See* 116 Cong. Rec. 26966 (1970). A review of the Senate debate reveals no indication of the availability of the House Managers' Statement or an awareness of its contents. *Id.* at 26953-966. In fact, the Senate dispensed with the printing of the conference report in the record, *id.* at 26953, and Senator McGee engaged in a point-by-point oral explanation of the compromises struck in conference. *Id.* at 26953-54.

H.R. Rep. No. 1363 states on its face that it was "[o]rdered to be printed" on August 3, 1970, the same day on which the Senate agreed to the conference report. Well into the House proceedings of August 3, 1970, the House granted unanimous consent to the House Managers to file the conference report up to midnight on August 3. *Id.* at 27028. Chief Examiner Wenner discovered that, "[t]he pertinent parts of the transmittal sheet from the House contain only the instructions, 'Complete for Press, 7 AM'—undoubtedly 7 AM, August 4, 1970." He concluded that, "[t]he Report, including the Statement, was published on August 4, 1970." PRC Dkt. No. R71-1, Initial Decision 37 (R. 1-8).

The conclusion that H.R. Rep. No. 1363 was filed after the Senate had acted is further buttressed by the fact that the Congressional Digest's chronology shows Senate passage followed the filing of the conference report. *See* H.R. Calendars, 91st Cong. 155 (1970).

vered a lengthy statement (the "Udall Statement"). Both statements[62] contained language to the following effect:

> "The provision in the conference substitute with respect to costs attributable to a class of mail or type of service establishes a floor for each class of mail equal to costs which consist of those costs, both direct and indirect, that vary over the short term in response to changes in volume of a particular class or, even though fixed rather than variable, are the consequence of providing the specific service involved. In addition, the conference substitute provides for a judgmental assignment of some part of the remaining costs." H.R. Rep. No. 1363, 91st Cong., 2d Sess. 87 (1970), *quoted in Newsweek*, 663 F.2d at 1199-1200.

1. The House Statements Do Not Reflect the Intent of Congress.

The House Statements are aberrational in a number of respects. In the first place, they have no antecedent in the legislative history. Nowhere in the legislative history prior to the House Managers' Statement was the thought ever expressed that the statutory rate floor should be limited to short-run or any other type of volume-variable costs.

Second, the House Statements are not technically precise,[63] and therefore do not appear intended as a tech-

---

[62] For ease of reference, the House Managers' Statement and the Udall Statement will be referred to collectively as the "House Statements."

[63] Contrary to the House Statements quoted above, "indirect" costs, as the term is used in economic parlance, do not vary "over the short term in response to changes in volume." The Foster Associates Study referred to indirect costs incurred "for the common benefit of a number of classes, or of the whole enterprise." Foster Associates

(footnote continues)

nical elaboration upon the statutory language. Rather, it would appear that the House managers were merely attempting to explain the rate floor to their colleagues by providing an example that reflected the current state of the art in postal cost accounting. In other words, when the House Statements use the words "consist of," they apparently do not mean "consist only of, regardless of future developments."[64]

Most critically, the House Statements were made after the Senate had completed its consideration of the conference report. The situation is similar to that in *Benson* v. *General Services Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969), where the court stated:

> "To some extent, this interpretation contradicts that given by the Senate Report. The House Report accompanied the bill on its passage through the House of Representatives, after the bill had already passed the Senate. It therefore seems to me that it represents the thinking of only one house, and to the extent that the two reports disagree, the surer in-

---

(footnote continued)

Study 3-30 (DMMA App. 4b). The study went on to state that, for these types of costs, there is "no simple relationship between changes in the volume of any one of the services and the quantities and costs of resources required to produce them." *Id.* at 3-31 (DMMA App. 5b). *See NAGCP I*, 569 F.2d at 586 ("Strictly speaking, indirect costs may not be attributed by cost variability, at least not by short-term variability . . . ."); *see also* discussion p. 17, n.34 *supra*.

[64] This hypothesis is supported by the following sentence from Cong. Udall's statement on the House floor: "The committee felt that such costs were capable of objective determination and proof either by empirical observation or deductive analysis." 116 Cong. Rec. 27606 (1970). Cong. Udall does not state that these are the only costs capable of such determination.

> dication of congressional intent is to be found in the Senate Report, which was available for consideration in both houses." 289 F. Supp. at 595.

Also, in *Vaughn* v. *Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975), *cited with approval*, *Department of Air Force* v. *Rose*, 425 U.S. 352, 366 (1976), the court accepted the Senate reading of the statute, because its report was before both houses of Congress while the House Report was not, and because the Senate was thereby denied the opportunity to comment on the House interpretation.[65] The view that a report written for one house after the other already had passed the bill should be given lesser weight than the prior report has been accepted by commentators.[66]

2. The House Statements Have Been Rejected by the Postal Rate Commission and by the Postal Service.

It is fundamental that judicial deference should be accorded the interpretation of a statute by the agency charged with its implementation, especially to the agency's original interpretation, since it "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315

---

[65] *See also Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969), and *Soucie* v. *David*, 448 F.2d 1067, 1077, n.39 (D.C. Cir. 1971). *Cf. Davidson* v. *Gardner*, 370 F.2d 803, 828 (6th Cir. 1966, *as amended* March 7, 1967) ("The report of a committee of the House 'does not go very far to show the intention of a majority of both houses of Congress' ").

[66] *See* K. Davis, *Administrative Law Treatise* § 3A.31 at 175 (1970 Supp.) ("The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not just one").

(1933) (Cardozo, J.); *accord Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Watt* v. *Alaska*, 451 U.S. 259, 272-73 (1981).

On matters of postal costing and pricing, the Postal Rate Commission is the agency to which this judicial deference is owed. *See* discussion pp. 12-14 *supra*. From the beginning, the Commission has rejected "short-run volume-variable" costs as the legally required measure of the rate floor.[67] The Postal Service has also, by its actual costing practices, agreed with the Commission in rejecting the House Statements as representing a valid interpretation of 39 U.S.C. § 3622(b)(3).

In the first rate case, PRC Docket No. R71-1, the Commission accepted as the best figures available USPS computations of attributable costs based largely upon short-run volume-variable costs. The Commission clearly believed, however, that it would be proper to make a long-run variability analysis in the future:

> "Reliance upon the Service's methodology in this case is also reasonable because that approach is the only viable costing presentation before us. Whether in future years long-run costs may become a more appropriate measure of attributable costs cannot be determined now. For the time being, as the Litigation Division correctly observed, long-run incremental costing (for example) 'remains theoretical and is unproven' on this record . . . ." PRC Dkt. No. R71-1, Opinion and Recommended Decision 56-57 (June 5, 1972) (R. 1-279).

The Postal Service also acknowledged that a "new look" at the threshold costing approach would be appropriate, including possible consideration of long-run incremental costs. PRC Dkt. No. R71-1, R. 3-626.

---

[67] For a useful discussion of the development of costing principles, *see* First RD, Vol. II, App. B; *see, especially, id.* at 2-3, 55-58.

In the second rate proceeding, PRC Docket No. R74-1, the Commission stated even more firmly that long-run volume-variable costs should be included in the computation of attributable costs. The Commission stated flatly that "[l]ong-[r]un [v]ariable [c]osting [i]s the [p]roper [c]osting [m]ethod for [p]ostal [r]atemaking."[68]

By the time it filed its rate request in the third general rate proceeding, PRC Docket No. R76-1, the Postal Service had developed a system that measured volume-variable costs beyond the short run, a development that the Commission applauded:

> "Proportionate variability is no longer followed by the Service; and its concept of an appropriate time span for studying variability, which it then limited, as noted above, to variability as a result of volume changes in the test year, no longer is the constraint it once was. The Service now specifically recognizes certain 'longer-run variable costs' that will not necessarily respond to test year volume changes, but are nonetheless variable over the longer-run and hence attributable. We will have more to say about the Service's efforts regarding these attributions, as well as the criticisms of some of the parties. What should be plain is that we intend to continue to encourage the creation of this evolving costing method for the Postal Service." PRC Dkt. No. R76-1, Opinion and Recommended Decision 77 (June 30, 1976) (R. 87) (footnotes omitted).

The utilization of longer-run volume-variable costs continues today. Such costs were measured and attributed in the Postal Service's initial testimony in PRC Docket No. R80-1[69] and in the Commission's First RD. First RD 133-5.

---

[68] PRC Dkt. No. R74-1, Opinion and Recommended Decision 127 (Aug. 28, 1975) (R. 1-604); *see also id.* at 131-35 (R. 1-608 to 1-612).

[69] *E.g.*, Exhibit USPS-8C, p. 3, (R. 21686) (J.A. 62a-63a) (testimony of USPS witness Dalton).

The Commission and the Postal Service could not have supported, and could not continue to support, the attribution of *longer-run* volume-variable costs, if they believed that the House Statements, with their references to *short-run* volume-variable costs, controlled the definition of the rate floor. [70]

The House Statements are the only source of authority for the proposition that the rate floor excludes costs that vary with mail characteristics other than volume. It follows that there is no authority recognized by either the Commission or the Postal Service upon which could be based a conclusion that Congress intended "direct and indirect attributable costs" to be limited to volume-variable costs plus specific fixed costs.

D. "Tier One" Costs Include Causally-Related Costs Only.

At the core of the *NAGCP I* decision is the (erroneous) conclusion that distribution-key allocation may be made in the absence of an identifiable causal relationship between a group of costs and the particular class, subclass or type of service to which the costs are allocated. The process espoused by *NAGCP I* would allocate a substantial portion of the non-causally-related costs in a manner similar to that utilized by ALJ Wenner in his initial

---

[70] Moreover, the Postal Service took the position in Docket No. R80-1 that *fixed*, service-related *transportation* costs should be added to the rate floor for preferential mails. *See, e.g.*, USPS-T-6, pp. 22-23, (R. 21270-71) (J.A. 89a-90a) (testimony of USPS witness Martin). Also, the Postal Service allocated fixed special delivery costs to Special Delivery and Express Mail services. *See* USPS-T-7, p. 8, (R. 21317) (J.A. 1a) (testimony of USPS witness Alenier). In view of the Service's espousal of the two-tier interpretation of the Act, these allocations are inconsistent with the notion that "direct and indirect attributable costs" are limited to volume-variable costs plus specific fixed costs.

decision in Docket No. 74-1.[71] Judge Wenner assigned a significant portion of USPS costs to classes of mail using distribution keys that he determined to be "reasonable," even though he could not identify a causal relationship between the costs and the classes to which the costs were assigned.[72] The Wenner method was rejected by the Commission in its Opinion and Recommended Decision in Docket No. R74-1. The Commission stated that the Wenner method utilized techniques reminiscent of the old Cost Ascertainment System, which had been resoundingly rejected by the Congress.[73]

The *NAGCP I* court reversed the Commission, stating:

> "The mere fact that a different formulation of the same distribution keys would result in a different overall attribution does not necessarily render the methodology arbitrary." *NAGCP I*, 569 F.2d at 591.

The court departed from the intent of Congress when it permitted the use of any "reasonable" distribution key in the absence of a causal relationship. While a "reasonable" distribution key may not be, strictly speaking, "arbitrary," the rate-maker's choice between distribution keys is arbitrary, unless it is founded upon an identified causal

---

[71] *See generally* PRC Dkt. No. R74-1, Initial Decision (May 28, 1975) (R. 1-5 to 1-6); *see also Newsweek*, 663 F.2d at 1197.

[72] *See, e.g., NAGCP I*, 569 F.2d at 583-84.

[73] The Commission stated that these techniques " '[do] not measure accurately the costs attributable to sub-classes of mail or to specific types of users.' " PRC Dkt. No. R74-1, Opinion and Recommended Decision 107 (Aug. 28, 1975) (R. 1-584), *quoting* Foster Associates Study 4-21. *See* discussion p. 44, n.95 *infra*.

relationship.[74] Otherwise, the rate-maker has no guide for choosing between several equally reasonable distribution keys other than their relative ability to produce a pre-determined result. Such a process is unscientific and obscures from public scrutiny the actual (often political) reasons for the choice of the key, contrary to Congress' express desire to get politics out of postal rate-making.[75]

* * *

A single, remarkably clear theme runs through the legislative history and the subsequent experience with postal rate-making under the Act. Congress, supported by the Foster Associates Study, the Kappel Report, PMG Blount and other POD officials, wished to eliminate cross-subsidization among the classes by requiring that each class pay its own way; the Postal Rate Commission was authorized to measure the costs for which each class was

---

[74] As the Commission stated with respect to ALJ Wenner's "reasonable" cost distributions, the choice of distribution keys is based on assumptions that "clearly rest on personal judgment, not on any principle of cost causation, and are impossible to test by statistical means." PRC Dkt. No. R74-1, Opinion and Recommended Decision 106 (Aug. 28, 1975) (R. 1-583).

Although the Commission has attempted to comply with the mandates of *NAGCP I* and *NAGCP III*, it has never accepted the proposition that costs may be allocated using distribution keys without the identification of a causal relationship between the costs and the classes to which the costs are allocated. The Commission has consistently rejected the proposition that any "reasonable" distribution key may be used to allocate assignable costs. Thus, in its First RD the Commission took particular pains to state that it would not utilize a distribution key unless such distribution key reflected the causal relationship between costs and classes of mail. First RD 141; *see* discussion p. 10, n.13 *supra*.

[75] *See* authorities cited p. 14, n.26 *supra*.

responsible and to allocate these costs to the respective class. In its dozen years and through five omnibus rate proceedings, the Commission has been steadfast in seeking to allocate as many costs as possible. It has been equally steadfast in refusing to allocate any costs for which causal responsibility could not, under the then-current state of the art, be logically identified.

This Court should affirm the conceptual basis of the Commission's cost allocations and should hold that Section 3622(b)(3) requires that, as a minimum, each class, subclass or type of service bear all the costs that can be identified as being caused by that class, subclass or type of service.

IV. .The Commission's Use Of The Service-Related-Cost Methodology Should Be Upheld.

In Docket No. R77-1 the Postal Service proposed to assign to the preferential classes that portion of the non-volume-variable delivery costs that could be saved if mail were delivered to each address on three days intead of six days. After extensive litigation the Commission approved this "service-related cost" ("SRC") methodology, and the D.C. Circuit affirmed in *NAGCP III*. 607 F.2d at 434. The Postal Service withdrew its support of SRC in its initial filing in Docket No. R80-1, but the Commission utilized SRC in its First RD, and the *Newsweek* court affirmed. 663 F.2d at 1202-03. This Court should affirm the Commission's use of SRC, because it comports with applicable statutory requirements and is supported by substantial evidence of record. [76]

---

[76] As the *NAGCP III* court stated, "we judge a particular ratemaking methodology by whether it is reasoned, nonarbitrary and congruent with the statutory mandate." 607 F.2d at 408. *See also id.* at

(footnote continues)

A. The SRC Methodology Comports With The Requirements Of The Act.

Service-related costs are one type of "assignable" costs, as defined by the Commission. First RD 120. The lawfulness of SRC follows from the conclusion that the Commission's Basic Definitions are proper under the Act. *See* discussion pp. 9-10, 14-36 *supra*.

In addition, the concept now known as "service-related costs" was viewed both by the Congress and by the Kappel Commission as the type of non-volume-variable costs that might properly be allocated to the responsible classes. [77]

B. The Governors' Rejection Of The SRC Methodology Is Irrelevant To This Case.

In considering the validity of the service-related-cost methodology, this Court should accord no weight to the Governors' rejection of SRC. First Decision 14-15 (Pet. App. 12b-14b). To do so would violate two of the most fundamental principles established by Congress: first, the status of the Commission as the expert body with discretionary decision-making authority on postal costing and pricing issues; and second, the requirement that postal rates be based upon the evidence of record.

(footnote continued)
401, *citing NAGCP I*, 569 F.2d at 592-93 (a court has an "obligation to defer to the PRC's expert judgment in the selection of cost allocation methodologies"). *See generally New York* v. *United States*, 331 U.S. 284, 328 (1947).

[77] Kappel Report 130-31 (DMMA App. 7a); *see also* Postal Modernization: Hearings Before the Committee on Post Office and Civil Service, United States Senate 91st Cong., 2d Sess. 509 (1969) (testimony of Postmaster General Blount). *See* discussion pp. 21-22 *supra*.

As was discussed above, Congress created the Commission, not the Postal Service, as the independent, professional body of rate-making experts, and Congress gave the Commission the authority and responsibility to apply the statutory guidelines in the area of postal costing and pricing.[78] The Governors' position as to SRC is certainly entitled to serious consideration by the Commission, but it is the Commission, not the Postal Service, that is authorized to *decide* whether SRC is an appropriate costing methodology. If this Court were to permit the Postal Service to overrule the Commission on costing or pricing issues such as the status of SRC, the Commission's role in the rate-making process would be eviscerated, and the lengthy, expensive proceedings before the Commission would be reduced to a sham.

Moreover, contrary to the explicit statutory requirement that postal rates be determined based on the evidence of record,[79] the First Decision relies wholly, aside from legal argumentation, on assertions that were never raised on the record. The Governors stated, in effect: SRC should be rejected, because we say so. *Accord* Second RD 71-72. First, the Governors stated:

---

[78] *See* discussion pp. 12-14 *supra; see also* the limited options given to the Governors upon receipt of a PRC recommended decision under 39 U.S.C. § 3625.

[79] The requirement that the Commission make its recommended decisions on the basis of a full-blown hearing on the record is given prominence in the statute. 39 U.S.C. § 3624; *see Newsweek*, 663 F.2d at 1205. The desire of Congress to get politics out of postal ratemaking and to have postal rates based upon "scientific or quasi-scientific evidence" rests at the foundation of the entire postal rate-making scheme crafted by Congress. S.Rep. No. 912, 91st Cong., 2d Sess. 11 (1970); *see also* authorities cited p. 14, n.26 *supra*.

> "Whatever the justification at the time, substantial increases in mail volumes since [Docket No. R77-1] call into question the hypothetical assumptions on which the theory was based." First Decision 14 (Pet. App. 13b).

This assertion had not been raised during the hearings before the Commission; had not been subjected to cross-examination; and is questionable on its face.[80]

Second, the Governors asserted that:

> "No one who is informed on postal matters can seriously suppose that the Postal Service would make regular deliveries only three days a week if a few paragraphs concerning priorities were cut out of some internal operating instructions." *Id.*

This assertion is completely contrary to the position taken by the Postal Service in its testimony in Docket No. R77-1. *See* Second RD 105-06. The scant Postal Service testimony on SRC in Docket No. R80-1 did not even address this point.[81]

---

[80] It is not apparent how service-related costs, which by definition are *fixed* costs, could be affected by changes in volume. *See also* Second RD 108, n.1.

The Third Decision raised briefly other novel arguments, including the assertion that SRC could have a "spiraling effect" on volume diversions and "may constrain the ability of the postal system to evolve new categories of mail based on actual service distinctions." Third Decision 17-18. These assertions also lack record support.

[81] The Commission concluded, "[t]here is hardly any discussion in the R80-1 record, either in testimony or on brief, of the theory or application of the service-related costing concept." Second RD 70. During the course of the hearings, the Postal Service merely raised a few objections that had been considered and rejected by the Commission and the court in Docket No. R77-1. *See generally* First RD 145-53; *see also NAGCP III*, 607 F.2d at 406-412.

Because it was based on reasons for which there was no record support, the Governor's rejection of SRC is contrary to the principle that was, perhaps, more important to Congress than any other: that postal rates be established not in smoke-filled rooms but in the open, based upon expert consideration of economic evidence. This Court should reject the Postal Service's attempt to resolve the SRC issue in a manner contrary to that envisioned by Congress.

C. The SRC Methodology Is Supported By Substantial Evidence Of Record.

If this Court reaches the substantial evidence issue, it should conclude that the Commission's continued utilization of SRC was justified. The relative merits of SRC are discussed at some length in the First RD. First RD 145-156. The Second RD contains an even more detailed treatment that responds directly to the Governors' First Decision. Second RD 67-115. As the Commission demonstrates, the validity of SRC was firmly established in Docket No. R77-1,[82] and the record in Docket No. R80-1 contains no new evidence that would justify, much less require as a matter of law, its abandonment. DMMA respectfully refers the Commission's analysis to the Court's attention.

V. Costs That Cannot Be Identified As Being Caused By A Particular Class, Subclass Or Type Of Service Are To Be Distributed Judgmentally Based On Value-Of-Service And Other Factors.

If this Court interprets "direct and attributable costs" so narrowly as to exclude service-related costs, SRC

---

[82] Review of the record in Docket No. R77-1 is appropriate to determine the rationale and evidentiary support for SRC. *See NAGCP III*, 607 F.2d at 425, and cases cited therein.

must be rejected, because "tier two" costs cannot be allocated using distribution keys. Under the Act costs that cannot be identified as being caused by a particular class, subclass or type of service are to be distributed judgmentally based on value-of-service and other factors. [83]

Congress understood that once cost causality had been traced to the maximum extent feasible, the problem was not one of "costing;" it was one of "pricing." It was a problem of determining a method for strategically setting prices so as to promote efficient use of postal facilities, while raising revenues sufficient to cover total costs.

A major thrust of the postal reform effort was to transform the cabinet-level Post Office Department into an independent federal establishment that would be operated not unlike other business enterprises and whose prices would be set using principles applicable to public utilities. [84]

---

[83] The *NAGCP I* court erred in holding that a significant portion of the non-causally-related costs *must* be assigned using some "reasonable" distribution key. *NAGCP I*, 569 F.2d at 586. The *Newsweek* court erred in holding that the Commission's discretion is so broad that it *may* use distribution keys to allocate non-causally-related costs in the pricing process. *Newsweek*, 663 F.2d at 1202.

The *Newsweek* court, having held that "direct and indirect attributable costs" include only short-run volume-variable costs, went on to hold that the PRC was nevertheless justified in utilizing the "service-related-cost" methodology to distribute a portion of the remaining USPS revenue burden. The *Newsweek* court held, in effect, that Congress had given the Commission sufficient latitude to permit distribution-key allocations of "tier two," non-causally-related costs. This holding is in error.

[84] This purpose was closely related to the Congressional goal that the Postal Service become self-sufficient financially. *See Direct Mail*

(footnote continues)

Thus, the Foster Associates Study applied the analogy of an independent business enterprise and endorsed "pricing policies for postal services similar to those of public utility industries."[85] Specifically, the Study recommended the adoption of value-of-service pricing, which reflects such diverse market factors as differences in the nature of the various services provided and the differing demand characteristics of these services.[86] It was hoped that by relating price to market demand, subject to the constraints imposed by cost analysis, postal management would:

> "take advantage of customers' different desires for service, and in this way obtain the best use of capacity under the largest scale of use . . . ."[87]

The necessity of transforming the postal system into an enterprise modelled after a regulated utility was also described in the Kappel Report. The Report states that while a cost analysis "places a floor under the price for a given class of mail . . . [it is] . . . market reaction or value of service [that] provides the ceiling."[88] The Report realized that:

(footnote continued)
Advertising Ass'n, Inc. v. *United States Postal Serv.*, 458 F.2d 813, 817 (D.C. Cir.), *cert. denied*, 409 U.S. 843 (1972) (". . . central purpose of the Act to place the Postal Service on a self-sufficient basis."); H.R. Rep. No. 1104, 91st Cong., 2d Sess. 17 (1970) (". . . the Postal Service must be self-supporting. . . ."); 116 Cong. Rec. 27606 (1970) (remarks of Cong. Udall) ("self-sufficient enterprise").

[85] Foster Associates Study 1-3.

[86] *Id.* at 3-41 (DMMA App. 15b).

[87] *Id.* at 3-48.

[88] Kappel Report 131 (DMMA App. 8a).

> "like all economic activities the Post Office consumes scarce resources, it should employ pricing which helps insure the efficient allocation of those resources."[89]

The Administration's initial legislative proposal also endorsed the analogy to business enterprises,[90] and Congress concurred.[91] Value-of-service pricing was incorporated into the various bills[92] and is given prominence in the Act, appearing in Section 3622(b) prior to the costing "requirement." 39 U.S.C. § 3622(b)(2).

The term "value of service" has a relatively precise, technical meaning, and it has long been used in public utility rate-making.[93] As was clearly explained to the Congress, a value-of-service approach involves setting rates based on relative elasticities of demand.[94]

---

[89] *Id.* at 128 (DMMA App. 3a).

[90] *See* President's Message to Congress Relating to Reform of the Nation's Postal System, H.R. Doc. No. 121, 91st Cong., 1st Sess. 3 (1969) ("While the work of the Post Office is that of a business enterprise, its organization is that of a political department."); 116 Cong. Rec. 26957 (1970) ("The management structure will be patterned on the corporate form so successfully employed in the private sector . . . .") (remarks of Sen. Boggs).

[91] *See* H.R. Rep. No. 988, 91st Cong., 2d Sess. 7 (1970). ("The Postal Service is a public service but there is no reason why it cannot be conducted in a businesslike way and every reason why it should be").

[92] *E.g.*, S. 3842, 91st Cong., 2d Sess. § 3704(g)(2) (1970).

[93] Kappel Report 132, n.1 (DMMA App. 9a); Foster Associates Study, Glossary vi (DMMA App. 23b).

[94] Kappel Report 134 (DMMA App. 12a).

By the same token, Congress clearly recognized that the "fully distributed cost" approach, by which "pricing" was accomplished through the choice of distribution keys, led to spurious impressions of accuracy and prohibited the application of beneficial economic principles used by businesses. [95]

The *NAGCP I* decision proceeds from the erroneous premise that Congress considered and rejected demand-oriented pricing principles, such as the inverse elasticity rule, as being too "discriminatory." [96] Congressional in-

---

[95] Congress rejected pricing through use of distribution keys when it rejected fully distributed costs, the salient aspect of the old Cost Ascertainment System. Foster Associates Study 5-3 to 5-4; ("[W]hile full-distribution costing carries with it an appearance of certainty, . . . [it has] only a dubious value for ratemaking"); Kappel Report 30 (DMMA App. 2a) (full allocation "is not only arbitrary but uninformative"); *see also id.* at 132-33 (DMMA App. 9a-10a). As the Senate Report states:

> "Express companies in the private sector of the economy have expressed their very keen desire to include language in the bill which would require the recovery of fully allocated costs for parcel post. The Committee rejects the suggestion . . . ." S. Rep. No. 912, 91st Cong., 2d Sess. 17 (1970).

[96] *NAGCP I*, 569 F.2d at 589. Prior to *NAGCP I*, the PRC employed the inverse elasticity rule ("IER") as a pricing guide—"a benchmark for rate design." PRC Dkt. No. R76-1, Opinion and Recommended Decision 131 (R. 141). However, that benchmark was not employed in Docket No. R77-1 or in Docket No. R80-1 in view of the court's "serious doubt" regarding the propriety of IER. *NAGCP I*, 569 F.2d at 592, n.94; *see* PRC Dkt. No. R77-1, Opinion and Recommended Decision 15 (R. 1-00022). In part, the court's questioning of IER was premised on a conviction that assigning residual costs on the basis of demand factors was motivated by a determination to charge "what the traffic will bear" in each class of mail. *NAGCP I*, 569 F.2d at 581 and n.31. The court was misinformed both as to the extent that the Commission relied on IER to distribute

(footnote continues)

tent was exactly the opposite. Congress confronted and rejected as arbitrary and unworkable the previously util-

---

(footnote continued)
residual costs and the objectives of IER pricing. PRC Dkt. No. R77-1, Opinion and Recommended Decision 15 (R. 1-00022).

IER is a method of using marginal cost and demand elasticity to set prices that will maximize aggregate benefits to postal customers, subject to the constraint that total revenues must equal total costs. Under this method, prices are marked up over marginal costs so that the markup (as a fraction of price) for each service is in *inverse* proportion to the price elasticity of each service. *See NAGCP I*, 569 F.2d at 582; *NAGCP III*, 607 F.2d at 403.

Setting prices according to IER maximizes the "consumer surplus" of postal customers—"a measure of the difference between what customers would be willing to pay (if they had to) and what they do pay at the price of the service." PRC Dkt. No. R74-1 (R. 3-72) (testimony of USPS witness Vickrey). Moreover, "[f]ar from fostering monopoly pricing, the inverse elasticity rule is the only one that guarantees *for each and every service* a price lower than that which would be charged by an unregulated monopolist." *Id.* at R. 4-703 (emphasis in original). The foregoing statement appeared in the rebuttal testimony of Professor William Vickrey who responded to the characterization of IER as a method of charging "what the traffic will bear." Overlooked in that characterization is the requirement of the Act which limits total revenues to total costs—a requirement not imposed on a monopolist seeking to maximize total profits. Also overlooked is the result, contrary to monopoly pricing, of maximizing value of service to postal customers.

Finally, the *NAGCP I* court apparently believed (erroneously) that proper use of the IER requires that at least one class be "elastic" in the absolute sense. *See NAGCP I*, 569 F.2d at 582; *see also* PRC Dkt. No. R74-1, Initial Decision (May 28, 1975) (R.1-12). Even if the existence of an "elastic" class were a precondition to the proper application of IER, IER still should be approved, because the Postal Service has admitted that at least one type of mail, BRR carrier-route mail, does have an elastic demand. *See generally* Brief of Reuben H. Donnelley Corp., *et al.* 38, 45, n.39 in *Time, Inc.* v. *United States Postal Serv.*, Docket Nos. 81-4183 *et al.* (2d Cir., *filed* September 30, 1981).

ized Cost Ascertainment System. Congress followed the recommendations of the Foster Associates Study and the Kappel Report, which espoused "marginal-cost pricing," utilizing value-of-service concepts to distribute institutional costs.[97]

CONCLUSION

The *NAGCP I* court was justified in chastising the Commission and the Postal Service for applying an overly restrictive definition of "direct and indirect attributable costs." The court was properly concerned that, under the circumstances that pertained in Docket No. R74-1, the amount of the costs to be distributed on a value-of-service basis was very large, creating an unnecessarily broad range for the exercise of the rate-maker's discretion. The D.C. Circuit properly directed the Postal Service and the Commission to intensify their efforts to identify causal relationships between costs and particular classes of mail. The D.C. Circuit went too far, however, in attempting to solve the excessive-discretion problem by substituting a discretionary choice of distribution keys in place of a discretionary application of economic pricing factors.

---

[97] The D.C. Circuit erred when it concluded that Congress' intention to prevent "discrimination among the mail classes," *NAGCP III*, 607 F.2d at 403, superseded its desire for economic efficiency. *Id.*, 607 F.2d at 404. The court failed to recognize the distinction between "discrimination" in the economic sense and "unfair discrimination" in the legal sense. Congress intended to prohibit discrimination to the extent that one class should not bear costs caused by another. On the other hand, Congress clearly envisioned that the rate-makers would discriminate among the various classes in the distribution of "tier two" costs, to the extent appropriate to apply value-of-service and the other economic, non-cost factors enumerated in Section 3622(b).

The *Newsweek* court erred in the opposite direction. Recognizing that the D.C. Circuit went too far in mandating the use of distribution keys, the Second Circuit imposed restrictions on the tracing of cost causality that were not intended by Congress.

Properly interpreted, the Act requires that the Postal Service and the Commission make all reasonable attempts to identify cost responsibilities, but that, when these efforts have been exhausted, the remaining "residual" costs be distributed to the classes on the basis of the economic pricing factors, primary among which is value-of-service.

Respectfully submitted,

DANA T. ACKERLY
Counsel of Record

CHARLES LISTER
DAVID K. FLYNN

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Direct Mail/ Marketing Association, Inc.

July 1982

APPENDIX A

Selected Portions of

TOWARDS POSTAL EXCELLENCE
The Report of The President's Commission on Postal Organization ("Kappel Report")*

Part I. Analysis and Recommendations

Chapter 1—The Post Office in Crisis

* * * * *

C. Postal Finances

* * * * *

[29] 3. The Irrational Postal Rate System

The system of user rates and fees (which pay 81% of postal costs) is disturbing in its irrationality. In common with utilities generally, the Post Office has a rate structure separated into classes to reflect differences in service levels and handling costs for different kinds of mail. Lower third-class mail rates, for example, take into account the mandatory pre-sort and ZIP Code requirements for that class, its lower handling priority and its relative lack of privacy. The extent to which each class of user and the taxpayer supports the Post Office is shown in Figure 9 on the following page.

Whether every class pays its "proper" rate is a long-standing controversy which cannot be resolved in the absence of functional cost [30; chart omitted] data which the current cost system does not generate. The Post Office uses a Cost Ascertainment System, authorized by a 43-year-old statute, for determining the revenues, volume and cost of each class of mail. For determining costs it uses the "fully-allocated" method through which every postal expense is charged to some class of mail or special service. A large segment of postal costs,

---

*Pagination of original document indicated in brackets.

however, does not result from handling a particular class of mail but is the cost of maintaining the postal system itself. The allocation of such institutional costs to specific postal products, despite painstaking attempts to reach fairness, is not only arbitrary but uninformative.

The Commission therefore questions the validity of this System for determining whether a given class pays its way; nevertheless, it provides the only data available at present.

[31] Under Cost Ascertainment only first-class and airmail cover their "fully-allocated" costs. Second-class mail (magazines and newspapers) has the lowest cost coverage, projected to be 26% in Fiscal Year 1968; third-class (advertising) the next lowest, projected to be 76%. Some items within these classes undoubtedly do not pay their way, while others do. Under the broad averages used in Cost Ascertainment one cannot tell which are which.

In rigidly apportioning all postal costs—including the large pool of institutional costs not determined by mail volume—to each class of mail, the Cost Ascertainment System consciously ignores such "intangible" factors as priority of service, value of the service to the user and privacy accorded. It leaves to the Congress the task of reflecting these factors in the rate-setting process. Consequently, the prices Congress sets to reflect the lower service some classes of mail receive have come to be known, disparagingly, as "below-cost" rates.

Pricing practices of many corporations (including utilities) have moved away from reliance on such rigid accounting allocations and now take service and market considerations as well as cost into account. Postal management, too, needs a modern cost accounting system, one that shows, by each postal function, how costs vary with each class of service, how much each class contributes to peakload and the size of the remaining pool of institutional costs.

While data on postal costs are unreliable, information on the market for postal services is nonexistent. Only when reliable

cost and market information is available will it be possible to tell which class is and is not "paying its own way."

* * * * *

Part II. Special Studies

* * * * *

Study 4 Postal Rates

* * * * *

[127] B. Economic Standards And Postal Rates

1. The Propriety Of Economic Standards

Lack of objective economic rate standards is a principal shortcoming of the present postal system. The "public service" emphasis in the 1958 Postal Policy Act does not preclude, however, the use of economic standards in the establishment of postal rates. The Post Office indeed is a "public service," as the Act says, in the sense that, like a utility, it must by law serve the public without discrimination. [128] Also, the Post Office, in the words of the Act, "is not a business enterprise conducted for profit." Yet like all economic activities, the Post Office consumes scarce resources, and it should employ pricing which helps ensure the efficient allocation of those resources.

(The Postal Policy Act also refers to the "public service allowance"—those items of postal cost which are not to be included in determining the postal rate base. Because these subsidy items involve unique problems, they are treated in the final section of this study.)

The postal service is now principally a commercial medium. Only 14% of all mail is household-to-household communication, and half of that consists of greeting cards. The post is no longer the only way to send interpersonal messages, nor the only method of transmitting news and opinions.

Because the public welfare attaches to the postal service to the same degree as it does to other major utilities or communications media, we find that the Post Office is essentially a public utility. It operates as a limited monopoly; it must charge a uniform price for a given class of service and must serve all

customers who are willing to pay that price. It must, therefore, maintain a capacity for serving all anticipated users. We conclude, therefore, that the principles which apply to public utility pricing are also applicable to pricing postal services.

2. The Postal Monopoly

Before examining the public utility pricing standards applicable to the Post Office, we first consider the postal monopoly, which gives the Post Office one of its principal public utility characteristics. The United States Post Office has a monopoly, dating from the Articles of Confederation, on much of first-class and certain portions of third-class mail. Historically, governments monopolized postal service to control the channels of communication and to derive revenues. The censorship element was never strong in the United States, but in our early years the revenue element was. Though the origins of the postal monopoly are different from those of other utilities, the economic justification today is the same.

Two of the reasons why utilities have been chartered as monopolies are directly applicable to the Post Office monopoly:

"Natural Monopoly." There would be obvious inconvenience and waste in having two telephone companies serving the same territory since customers would either need two instruments or be limited in the number of other patrons they could reach. Similarly, it would be inconvenient and wasteful to have two gas companies tearing up the same city streets. Like other major utilities, the Post Office has an element of "natural" monopoly: the waste of having several companies duplicating daily deliveries to almost every house is apparent.

[129] *Protection of Revenue.* A second reason for the utility monopoly is that many utilities are more vulnerable to competition in some portions of their activities than in others. The postal service is particularly vulnerable to "cream-skimming" in the high-volume, high-value segments of its market, e.g., delivery within or between downtown business districts of major cities. It would probably be uneconomic for the

Post Office to meet competition by offering a reduced rate for such service because of the additional costs of administering a rate scheme split along geographic lines. The competitor would then be able to serve the low-cost segment of the market, leaving the Post Office to handle the high-cost services. Under such competition the Post Office would lose lucrative portions of its business, increasing its average unit cost and requiring higher prices to all users.

The Commission concludes, therefore (as did our rates and market contractors), that the postal monopoly provided by the Private Express Statutes should be preserved, although not necessarily in its present form. The current statutes establish a Government monopoly on "letters and packets." Around this phrase has developed a body of regulations which, however correctly they may reflect the law, do not seem to be adapted to the reality of modern communications.

A number of organizations, too, have service requirements between separate facilities of their own organization which cannot be met by the Post Office. Currently these organizations must pay the Post Office a penalty fee equivalent to the postage on such mail if they choose to have it transported by private carriers. We recommend a slight relaxation of the postal monopoly to permit organizations to make their own arrangements for intra-company mail when they can demonstrate to the Postal Rate Commissioners that the Post Office does not provide them with adequate service.

3. Standards for Postal Rates

All public utility rates must be set to be just and reasonable. Under monopoly conditions the market cannot be relied on to set optimal prices. We have identified three economic standards for determining just and reasonable postal rates: the budgetary standard; the long-run variable cost standard; and the value of service standard.

a. The Budgetary Standard. The principal purpose of a rate structure is to provide the revenues necessary to sustain the

enterprise. Privately-owned utilities are entitled to recover all of their legitimate economic costs, such as operating expenses, depreciation, interest on debt, profit for equity capital, a reserve for contingencies and an allowance for research and development, where appropriate. This overall revenue requirement may be termed the "budgetary standard."

[130]The Postal Policy Act sets a budgetary standard for the Post Office by specifying that postal revenues as a whole should equal costs as a whole, exclusive of "public service costs." The budgetary standard sets a floor, however, as well as a ceiling. Since the requirement of the Act that revenues cover costs (except for public service costs) has not, in fact, been followed, the postal service has had to be subsidized by the taxpayer.

It is essential that postal revenues be brought into line with postal costs. Although this process may well be spread over several years to minimize the impact on mail users, only a self-supporting postal service can keep up with user needs and can keep costs at the lowest possible level.

b. Standards for Pricing Different Services. Apart from the requirement that total costs must be covered, the method by which postal costs are assigned to each class of mail must be equitable and based on sound economic principles. The two components of class-of-mail costs are the actual cost of providing the specific service and the share of institutional postal costs which each class is asked to bear. They are discussed separately below:

1. Long-Run Variable Costs. Like most other utilities, the Post Office offers a number of services, e.g., movement of letters, parcels and bulk mail. A utility is not allowed to discriminate unduly among its users in the pricing of its services: one class of users may not be charged with costs demonstrably related to another class.

We believe that the same prohibition of undue discrimination should apply to postal pricing. It would be patently unfair, for example, if the cost of a parcel sorter were charged to the

users of letter mail. Similarly, if the mailers of bulk mail are required to presort their mail in such a way that it bypasses primary distribution, it is unfair to charge them with primary distribution costs.

When many services share a common plant, however, allocation of costs among them becomes more difficult. In the Post Office the problem is typified by the allocation of delivery costs: which class should bear the costs of a city carrier who delivers letters, circulars, magazines and sometimes even parcels? One alternative—embodied in the current Cost Ascertainment System—is to allocate such costs by a formula combining the number of pieces of each class of mail, the weight of such pieces and the number of stops required for each class of mail.

It is no small task to make such full-cost allocations fairly. Under the present allocation of carrier costs, for example, pieces of first-class and third-class mail are charged the same costs despite the fact that first-class mail must be delivered the day the carrier receives it (even if he must work overtime to do it) while third-class mail need not be delivered until the second day.

[131] Further, as we noted in Part I, much of the cost of city delivery is an institutional cost.* It does not vary greatly with fluctuations in volume but rather on the basis of such factors as growth and density of population. Since no particular class of mail causes such costs, there is no reason from an accounting viewpoint why any particular class should be charged with them. (They must be borne somewhere, of course, if the Post Office is to meet the budgetary standard.)

On the other hand, to avoid undue discrimination every class of service should, as a minimum, pay for all of those costs which

---

*Institutional costs should not be confused with capital costs. Certain capital costs may be directly attributable to a specific mail class, e.g., a parcel sorter, but institutional costs, even when they are labor expenses, are those attributable to the Post Office *as a system*.

it alone causes. Thus parcel post should pay for the parcel sorters, and each other class of mail should pay for those *added* costs of processing and delivery which it causes the Post Office to incur. It makes no difference whether these costs are capital costs or operating costs, nor should the inquiry be confined to what costs the class has generated historically, but should extend to include what costs it will cause in the foreseeable future. In economic terms, each class should bear, as a minimum, the long-run variable costs ascribable to it — the full added costs demonstrably related to that class.

2. Value of Service. If the utility is to cover all its costs from its revenues, however, some classes must pay rates high enough to cover the large pool of institutional costs which we estimate represent between 40% and 50% of total postal costs. Allocation of this pool to classes by an accounting formula is inherently arbitrary; we must look to market considerations for the economic rationale for this element of utility pricing.

Services and the demands for them differ. The demand for some services may be so strong (i.e., inelastic) that they could bear a large part of postal institutional costs in addition to the costs they themselves cause. On the other hand, the demand for other services may be so weak (elastic) that they can bear little more then their long-run variable costs. These services cannot bear a heavy load of institutional costs, but pricing them somewhat above their long-run variable costs permits the institutional costs to be spread over a wider base. This practice benefits both the low-value user who receives service he could not otherwise afford and the high-value user who otherwise would have to bear a greater share of the institutional cost.

Thus, the requirement that long-run variable costs must be covered places a floor under the price for a given class of mail, but market reaction or value of service provides the ceiling. There is little point in pricing a service at more than its value to the user. So long as rates are set above the long-run variable cost, the upper limit should [132] be established in such a way as to maximize the use of the service and thus spread in-

stitutional costs over the greatest number of users. This policy will reduce average costs for all mail, particularly if sound management practices and improved technology yield steadily lower unit handling costs.

c. Summary. Three economic standards for pricing postal services thus emerge: **(1) "Budgetary": the enterprise as a whole should recover its costs. (2) "Variable Cost": no service should be priced below the full added cost of that service. (3) "Value of Service": pricing should reflect the differing demands for different services, spreading fixed costs as widely as possible.***

C. Application of Standards To The Post Office

1. The Cost Ascertainment System

Postal pricing relies heavily on the Cost Ascertainment System, used since 1926 to determine the revenues and costs attributable to each class of mail and special service. It is the basis of the "Survey of Postal Rates" which the Postal Policy Act requires the Postmaster General to submit to Congress every two years. The accounting firm of Ernst and Ernst studied the Cost Ascertainment System for the Commission and reported that "the present . . . System is not an appropriate basis for rate making." The firm cited four basic weaknesses:

First, present time reporting methods by employees are unreliable. Apparent inconsistencies exist in employee time reporting and variations in productivity; these inconsistencies tend to distort the costing results.

Second, the fully allocated cost principle underlying the present system and the failure to develop costs specifically by

---

*While these principles are not recognized in every utility rate case, they have long been familiar to utility commissions, accountants and economists. *The Explanation of Rail Cost Finding Procedures and Principles Relating to the Use of Costs*, for example, issued by the ICC's Bureau of Accounts in 1954 (Statement No. 4-54) and again in 1963 (Statement No. 7-63) elaborates upon similar principles in the context of railroad rates.

work activity or function as well as by class of mail or service preclude the use of the data for marginal cost analysis or control of operations.

Third, the system fails to develop cost data except in broad averages. It is unduly complex for the results obtained. Despite the complexity of sampling and allocation methods used, the system cannot give appropriate recognition to cost differences existing between types of mail within a class. For example, it does not recognize variability of costs resulting from the performance of sorting and other processes by some mailers but not others. Further, this weakness is particularly significant with respect to the differential in rate [133] paid to employees assigned to night shift hours. The total cost of each class of workers is allocated to the several classes of mail, both priority and non-priority, at an average rate.

Finally, reliance on unsupported judgment for determining certain significant allocation bases, for example, the judgment used in connection with carrier street time, results in invalid costing. A second instance of the use of judgment arises in the allocation of costs to sub-classes of second-and fourth-class mail. . . .

2. Determining And Assigning Variable Costs

Apart from the inadequacies of the System, however, its basic policy limitation remains: We do not believe that *any* fully-allocated system is appropriate for rate-making. Full-cost allocation blurs the critical distinction between variable and fixed costs and makes it impossible to determine whether a particular class pays its true costs. For rate-making purposes we recommend use of a functional cost accounting system. The Planning, Programming, Budgeting System (PPBS) now under development in the Post Office may be a start in the right direction. Each postal function, such as mail acceptance, processing and delivery must be analyzed to determine the variability of its costs over the long run. The five-year planning horizon used in PPBS appears long enough for purposes of rate-making.

Once the variable costs of each function are determined, they should be assigned to the classes of mail in proportion to the responsibility of each for such costs. Assignment of many variable costs is, of course, a highly technical process. The particular costs related to the daily peak, for example, should be charged proportionately to those classes which cause the peak. (A procedure for identifying such special capacity costs is given in the Foster Associates report.)

3. Assigning Fixed Costs

Assigning the variable costs is only half the job. The Post Office must develop data and make judgments concerning the value of and the demand for the various classes of mail service in order to assign to each an appropriate share of the institutional costs. The greatest proportion would be assigned to services with the highest value.

Value of service data is almost totally lacking. The value of service can never, of course, be determined with mathematical precision, but there does not now exist even a framework on which to build. Determining and assigning variable costs is a technical job for the accountant, economist and engineer; fixed cost assignment, on the other hand, can only be guided by market and economic studies, and the range for management judgment is wide.

"Value of service" emodies two concepts: what the customer gets and what he will pay.

[134] There are wide differences in the types of postal service available. Some classes receive priority handling, others do not; some get guaranteed privacy of treatment, others do not. Some mail enters the system via collection boxes; other mail must be ZIP Coded, presorted, bundled and brought to the Post Office. The difference in service will, of course, be reflected in the long-run variable costs assigned to these classes. It should be reflected as well in the share of institutional costs each class is asked to bear: a greater proportion of institutional costs should be recovered from those customers who get more service from the Post Office.

What the customer will pay for postal services (i.e., the "elasticity" of demand) has been a fertile source of controversy. Judging by past rate increases, demand for first- and third-class mail seems relatively "inelastic"—that is, the demand appears sufficiently strong so that the average customer does not significantly cut back his use of the service with higher prices, and an increase in price produces an increase in revenue. The amount of past rate increases is small in absolute terms, however, and the effect of other, unknown factors on mail volume is so great that we cannot draw a firm inference from historical data.

Despite the fact that an increase in postal prices for most classes has produced increases in postal revenue and even assuming that this condition will continue, the strength of the demand still varies between the classes. The Post Office will lose fewer customers by raising some rates than by raising other rates. Because of this difference in strength of demand, if unit costs are holding steady or going down, sound management would assign more of the institutional costs to the service with the stronger demand. In this way the Post Office can best implement the policy of spreading fixed costs over the widest possible base and thus reduce average costs for all users.

Fourth-class mail presents different problems. Its demand is more elastic than that of first- and third-class mail—that is, demand is sufficiently weak that many customers cut back their use when prices go up. A recent series of rate increases has, in fact, produced but small increases in revenue. Parcel post volume, in particular, has declined in recent years as a result of competition from other small parcel carriers, restrictive size and weight limitations and rate increases.

Parcel post presents still other unique problems since the Post Office is but one of several organizations active in the small-parcel market. Fortunately, parcel post is frequently sorted and delivered separately from other classes of mail so its long-run variable costs can be more readily identified. While the present statutory requirement that parcel post cover its costs (a phrase which has been inter-[135]preted to mean fully-

allocated costs) within four percent may well be unduly restrictive, the Commission does favor some special provisions on parcel post pricing to ensure that the Post Office does not take unfair advantage of its governmental position. Such restrictions should require an imputation to parcel post prices of capital costs similar to those incurred in the private sector and also of some form of equivalent tax burden.

4. Implication Of Standards For Present Rates

While the Commission cannot predict the exact impact of these standards for each rate class, some rates today do not cover their long-run variable costs. Clearly, the one-and-a-half pound glossy magazine which can be mailed anywhere in the large metropolis in which it is published for two cents is not paying its way. Further, the broad averages of the Cost Ascertainment System blur vital distinctions, so that some types of mail in a class may well be paying their long-run variable costs while other types in the same class are not.

If the Post Office gears itself to meet the budgetary standard and break even, will a large across-the-board rate increase be necessary? Although in an era of rising costs rate increases cannot be entirely avoided, the Commission believes that over time, under sound management, the overall effect on rates will not be substantial. Further, rate reform cannot and should not occur abruptly. However invalid the present rate structure may be, many rely upon it. Rate reform and financial independence must be introduced on a phased basis over a period of years.

* * * * *

APPENDIX B

Selected Portions of

RATES AND RATE-MAKING
A Report to The President's Commission on Postal Organization
Annex II to Kappel Report
("Foster Associates Study")*

Chapter 3—Standards for Postal Rate-Making

* * * * *

[3-27] *3.4. Relating Price to Costs*

The foregoing analysis of the social economy aspects of public service pricing led up to the widespread reliance limiting revenues to costs as a means for limiting the monopoly powers conferred on such services in order to avoid wasteful duplication of capital resources. The term cost, however, does not have an unequivocal meaning, and its ascertainment is not a simple matter. Accordingly, we believe it desirable to give some close attention to the role of costs in establishing constraints on pricing of public services.

3.41 The Cost of Service. The idea that every public service has an unequivocal cost is deep-seated in the ideology of American public utility regulation. The first step in regulating utility rates is usually the determination of the "cost of service" for a recent twelve-month period. While some allowance may be made for anticipated changes in cost, it is usually assumed that the relationship between accounted-for cost and revenue sales for a particular past year will be characteristic of the near future and will provide an adequate test of whether rates are too high or too low. The POD's Cost Ascertainment System has been used in somewhat the same manner.

It is not always appreciated that when we compare revenues with costs we are dealing with flows of quantities through

---

*Pagination of original document indicated in brackets.

time. The division of these continuous flows into twelve-month periods is convenient and economically appropriate because of several variations in activities affecting both revenues and costs. But it is nonetheless artificial and conventional. Costs are incurred this year for flows running through several future years. Some of this year's costs may not recur, and thus may have no significance for determination of the reasonableness of next year's rates. What we really need as a test of the reasonableness of next year's rates is a measure of the revenues needed to assure continuation of service of acceptable quality.

Public service managements are aware of the need to match revenues and costs in the future. Accordingly, for managerial planning and [3-28] decision-making, what is most important are sound budgeting procedures and estimates. The total budget, including proper allowances for the consumption of capital and its support, is the appropriate measure of the cost of service. We accept the notion that the budget for next year's service, assuming it to be carefully and honestly developed, is the best measure of next year's revenue requirement and hence of the general rate level to be sought or permitted. This is what is here called the "budgetary constraint" on rate-making. The current year's budget can serve as a foundation for rate-making with which estimated trends must be blended.

The annual revenue requirement is usually defined as including allowances for (a) operating expense, (b) maintenance expense, (c) rentals for property used, (d) depreciation (or capital consumption), (e) taxes, or payments in lieu of taxes, and (f) return on investment. Costs of management and supporting staff services are included with operating and maintenance expenses. There is not much controversy as to the need to provide for all six of these major elements of "cost of service". Controversy is rife in utility rate cases, however, as to how each element is measured.

If the postal service remains a public enterprise, these controversies over the cost of service may not be quite as significant as for a privately-owned and financed operation. Under present arrangements, budgets for the POD are developed and

presented to Congress. Under any other arrangement for rendering the postal service, budgeting will still be necessary, and hence the budgetary constraint on postal rates can be made sufficiently definite to serve as a measure of total revenue requirements.

3.42 The Cost of a Class of Service. Since postal rates, like most other public service rates, are made for particular classes of users or uses, the question as to how a given revenue requirement should be divided among the several service classes becomes important. The budgetary constraint described above is the first step in what has been called *cost [3-29] standard* of rate-making. By that standard, public services are properly to be sold at cost, or cost (in the accounting sense) plus a fair profit. [1] The same standard is often sought to be applied to rates applicable to particular classes of business, but because much of the cost of service is for activities serving more than one class, the correspondence between cost and rates is very difficult to maintain.

It is frequently asserted that it is reasonable to set rates by reference to the fully-distributed or allocated cost of service for a particular test year. Such a standard is frequently urged in postal rate-making, although POD disclaims the usefulness of its Cost Ascertainment System for this purpose. We find that there is no economic justification for seeking to tie rate-making to cost-finding in any rigid way.

Much confusion over the application of cost limitations to rate-making arises over the several meanings attributed to the word "cost". Economists use the term generally to denote some measure of obstacles to production, usually in the sense of consumption of resources. Not all resource consumption is reflected in the popular idea of "cost", which tends to be confused either with "price" or with "expense". In law and accountancy, cost is more often than not defined to include all of the

---

[1] Bonbright, J. C., *Principles of Public Utility Rates* (Columbia University Press, New York, 1961), p. 23.

elements of a cost of service, as noted above, except return to the ownership capital. That is, interest is recognized as a cost, but not dividends. We shall use the term in the economic sense. While we accept the applicability of a measure of total cost as a limiting value for total revenues, particularly in a prospective planning or budgeting sense, we cannot accept any simplistic measure of cost as defining a reasonable class rate. In order to develop the way in which costs may reasonably constrain or limit making of a class rate we must analyze carefully the way in which costs change with changes in the quantity of service performed.

[3-30] *3.43 Direct and Indirect Costs.* The complexity of the problem of determining a cost of a particular class of service depends primarily upon the degree in which elements of cost can be identified with such class. Generally the *specific* or *direct* costs associated with a particular class of service do not represent a large part of the total revenue requirement. When all directly assignable costs are charged to particular services, there will remain a substantial amount of the total revenue requirements which relate to activities carried on for the common benefit of a number of classes, or of the whole enterprise. The apportionment of this indirect, joint, or common cost to service classes is the troublesome part of trying to make rates on the basis of cost.

It has long been recognized that the problem of pricing public utility services must deal with the fact that services of many types differing as to scale and character of use may be produced from the same resources. Thus, a telephone exchange serves local personal uses, business uses, long distance communication, and a number of other less well-known but definite uses. This switching mechanism of the central office is indifferent to the sort of communication which passes over the conductors which it connects into a communication pathway. The experience of the public service industries has been that it is not possible to divide the total cost of the service, or even of some facility which is part of the service, by units of output and to assess these equally to all users. In the early history of the industries, it was quickly found that much more service could be sold if prices were not constrained by average costing, and if

low prices were afforded to some users of the service for which added costs would be much less than the added revenue received. Thus, in the example developed in connection with Figures 3A and 3B, prices in the two markets were set according to users' demands and did not reflect cost differences.

It is not necessary in talking about difficulties with allocation that the costs for which we are concerned be *joint* in the economist's sense, as are beef hides and meat. In such cases, the proportions in which the products are produced are fixed and not controllable by the producer. There is [3-31] thus a constant ratio of production between hides and meat which is entirely indifferent to the butcher's manufacturing process. He is therefore unable to separate in fact the cost of the hides from the cost of the meat. In contrast, the indirect costs with which we are concerned are typically variable with changes in the output of any one of the services; but that variation is almost never in proportion with amount of use.

In the case of the Post Office, it is readily seen that there are wide areas of common cost rather than joint cost. Usually, one carrier delivers all classes of mail (except parcel post) to destinations. Similarly, communications of more than one class are sorted by one set of clerks, and all the operations are carried on under one post office roof. Changes in volume of one or another class may increase the requirements for deliverymen, delivery vehicles, sorters and handlers, or building space. However, there will be no simple relationship between changes in the volume of any one of the services and the quantities and costs of resources required to produce them.

3.44 Incremental, Average, and Marginal Costs. Most students of public service management and pricing can agree that a particular class rate ought to cover, not merely those costs which are incurred directly on behalf of that class of service, but also the variable portion of common cost which can be traced to such class.

There is little dispute over the proposition that rates for each class of service should cover at least the *incremental* cost of

such service. The term "incremental cost" is defined to mean the per unit addition to total cost experienced by reason of additional sales of the service in question.[1] As such, it could include both direct cost and the variable portion of common cost. That is, incremental cost in this sense is taken to impose a minimum-level constraint on the rate in question.

[3-32] But how is such additional cost to be measured? It has to be recognized that additions to cost come irregularly, particularly when large investments have to be made to increase capacity to serve. If we take a short-run viewpoint, this "lumpiness" of additional costs means that in some years our measure of incremental cost will vary greatly from long-run average experience. Such a "rubber yardstick" is not very useful as a constraint upon pricing.

This uncertainty as to incremental cost has led some to urge that class rates be fixed on the basis of direct cost plus average indirect cost. But if this is done, it is equivalent to a full distribution of cost; and some low-valued sevices might be priced out of the market, although they could be sold at rates sufficient to cover direct plus variable indirect cost. In some cases, as in the example of Figures 3A and 3B, an attempt to price at average cost would shut off access to markets and greatly curtail the scale of service output.

What is obviously needed is a long-run measure of cost variation with changes in scale of output. Such a measure could serve to indicate the minimum levels below which pricing would provide advantage to particular classes which would leave their deficiency of revenue to be covered from other sources. But how long a run? We think that the range covered by estimates of incremental cost should be as long as the rates in question are expected to remain effective. We here use the

---

[1] Some definitions of incremental cost are based on "the amount which would be saved if the service were discontinued". This measure would differ from the one given above because some costs cannot be saved "going downhill" although they would be incurred "going uphill".

term *marginal cost* to describe this long-range estimate of incremental cost, to distinguish the case from the usual engineering or accounting definition of incremental cost as short-run observation of the variability of cost.

However, even though we have reached a conclusion that a long-run measure of incremental, or *marginal*, cost can provide a lower boundary to a reasonable class rate, we still have to deal with the complexity of the actual measurement or estimation of cost variation with changes in scale.

[3-33] *3.45 Capacity Costs and the Peak Load Problem.* We have indicated that the "lumpiness" of cost variation with changes in output makes difficult the observation of such variation, and have traced such irregularity of variation to major capital additions. These considerations suggest that the quantity we have called marginal cost may express more than one mode of variation of total costs. We can expect that costs vary not only in terms of identifiable units of output, but also in terms of the service capacity required to make possible that output. Hence, marginal costs must exist with respect to variation in total cost with *both* capacity and output.

To see the relationship of marginal cost to total cost variation, we have to consider that total costs behave like a function (in the mathematical sense) subject to at least two independent variables. That variation may be illustrated by a diagram in three dimensions, as in Figure 3C. We now have the *two* independent dimensions of capacity and output, which determine total annual cost. Suppose that costs may follow a curved surface such as that shown in green in the diagram. We do not observe this directly, but rather cost estimates defined by the expected course of growth in both capacity and output. This course will be irregular, because of the irregularity of capacity additions to which we have referred, and is indicated by the line in the base plane of the diagram. As in Figure 3A, we are not interested in the whole possible range of variation of total cost, but with an area within which capacity and output can be expected to change during the period taken as the appropriate

"planning horizon" for rate-making; this area is indicated by shading. Our line of estimation passes through this area, and we make cost estimates at a number of specific values of capacity and output. These estimates define a plane which approximates the cost function, and is shown in red. The rates of increase in cost with changes in capacity and output are given by the slopes of the plane of estimation, just as in Figure 3A the marginal cost with a single output dimension could be represented by a straight line drawn through specific observations or estimates of total cost. What is of ultimate importance is to note that marginal cost exists in every dimension in which total cost may [3-34] vary. In this illustration, we have two dimensions of variation, but in practice there may be more. [1]

We still have a further complexity in taking account of capacity cost variation due to what is normally called the "peak load problem". Because use of a service tends to vary with time of day, day of the week or month, and season of the year, reflecting cyclical patterns in social and business activity, public service managements have long noted a tendency toward cyclical variation in the intensity of service use. The maximum coincidence in time of users' demands produces a peak load which is the principal determinant of the service capacity which must be provided. The situation is most acute for electric utilities, for which an unexpected overload could mean a complete breakdown of the service. The peak load problem is hardly less serious for telephone systems and for the Post Office.

The common denominator of the seriousness of peak loads is inability to store the service. Electricity cannot yet be effectively stored in quantity. [2] Neither can personal communi-

---

[1] For example, utility cost analysts have long noted that electric service costs vary with number of customers, capacity and output. Costs of a manufactured gas operation were early observed to vary with maximum daily demand and maximum hourly demand—two capacity parameters—as well as with customers and output.

[2] But the recent development of "pumped storage" hydroelectric plants has helped some utilities mitigate the impact of short-run hourly peaks.

cations of such nature that speedy handling and transport are essential. For such services, advance provision of sufficient capacity to handle peak loads is a necessary condition for safe and adequate service. Where storage is possible, in the cases of some water and gas utilities, short-time peak loads are not a serious problem; but seasonal variation in demands may at times cause rationing or limitation of use because of the expense for provision of capacity to handle extreme demands of low probability of recurrence. This condition may also occur in the handling of mail.

[3-35] Where a classified service is rendered, service classes may differ materially as to their contribution to the peak. For electric utilities in temperate and warm climates, commercial air conditioning is a principal contributor to the peak load, which tends to occur in summer. For the postal service, an hourly peak is created by the need to process first-class mail for next-day delivery, plus the practical necessity for collection of such mail at the end of the working day. A seasonal peak is created by the Christmas rush, to which first-, third-, and fourth-class all contribute.

For those services in which costs to provide capacity predominate, as for electric utilities, the peaking problem means that expensive capacity lies unused throughout part of the operating cycle. Accordingly, the electric utility customarily offers concession rates for off-peak loads, such as electric space heating when the annual peak is caused by summer air conditioning. The degree of coincidence of the peak load for any class with the system peak load ("coincidence factor") is an important consideration in relating rate design to costs. Likewise, the relative intensity of use of capac[illegible] ("load factor" or "capacity factor") is also significant. Fu[illegible]her study is needed to determine the relative importance for postal service ratemaking of these factors. As modernization and mechanization proceed, however, the importance of peak responsibility and load factor for establishing class rates for postal service will become more readily apparent.

3.46 The Marginal Cost Constraint. The foregoing analysis of the relation of cost to output of service suggests that no unit of any class of service be sold at less than marginal cost, properly defined, so as to avoid the need to have someone subsidize a growing deficiency in the prospective revenue from the favored class from the added cost which it imposes.

We accordingly define marginal cost for rate-making as the planned-for long-run rate of change of annual cost per unit of anticipated added [3-36] business. Such cost must include not only its direct costs plus the indirect cost of a unit of *output*, but its proper share of the annual cost of a corresponding unit of *service capacity*. Every unit preempts some present or planned-for service capacity, the quantity preempted being dependent on responsibility for the peak loads which determine system design. Correspondingly, *we define the marginal cost constraint on rate-making as the need for each class of service to be priced sufficiently high to cover its long-run marginal cost*, as estimated over a suitable planning horizon, including in such cost reasonable allowances for increases in related overheads and indirect costs.

It is important to recognize the distinction we have made between *marginal* cost and *incremental* cost. Many statements of the cost constraints, as we have developed them, refer to *incremental* cost as the "floor" for pricing. If pressed for a definition, probably most analysts would agree that *incremental costs* should be taken in a long-term sense, approximating what we mean by *marginal cost*. Others would insist on a "short-run" definition of incremental cost, in which costs saved by not serving the class of business in question would be considered the measure of a minimum rate.

The use of short-run incremental cost as a constraint on rate design has created much controversy in public utility circles, and has undoubtedly played a part in the attitude of some regulatory commissions that only fully-distributed costs are significant for rate-making. This incremental cost constraint has failed notably on several occasions—for instance, during the 1930's when many companies distributing manufac-

tured gas offered very low rates for house heating which could not be maintained when the rapid subsequent growth in demand necessitated large additions to plants and mains.

In the case of the postal service, arguments have been advanced to the effect that the primary function of the service is to deliver first-class mail, with other classes as "by-products". Therefore, the latter [3-37] need pay only the added "incremental" costs imposed, or alternatively the costs which would be saved were they not handled. This arguments rests on the misconception that postal service is a case of joint cost in the "hides and meat" sense, and has undoubtedly contributed to the tendency of Congress and POD to rely on fully-distributed costs provided by the Cost Ascertainment System. The costs of the so-called by-product services supplied are subject to increase with growth in demand independently of changes in demand for the "priority" services, and cannot be characterized as joint costs. The case of differentiated services with different growth rates involves common and not joint costs, and in such case long-run marginal cost provides the best available measure of the lower boundary for reasonable rates.

Part of the confusion over marginal vs. incremental cost has come from the academic world. For some economists, as well as for some business analysts, marginal costs are identified with the rate of change in total costs with changing use of a particular plant now in existence. Accordingly, their conception of marginal cost is limited to the cost of securing additional output and does not include any capacity-related cost. This short-run view of marginal cost may here be referred to as *incremental output cost*. We do not believe that this measure is significant for rate-making purposes.

Our definition of marginal cost is often referred to as "long-run incremental cost", but this identification is not quite accurate. Suppose that our starting level for measuring the increment contains elements of cost which can be avoided by future technical changes. Then, a measurement of differences from present to future total cost, divided by incremental sales, will *understate* marginal cost. If the present cost level is low because of deferred maintenance, etc., the marginal cost may be

overstated. Our definition of marginal cost as a rate of change in planned-for costs with changes in deliveries of service avoids this problem of an unrepresentative starting level.

[3-38] Of course, under decreasing cost conditions, prices based solely on marginal costs will not produce revenues equal to total costs. The sum of marginal costs will fall short of total costs by the amount of fixed costs (Section 6.3).

3.47 The Case of Increasing Unit Costs. So far, we have assumed that the postal services will show upon proper analysis the same tendencies toward diminishing unit costs with expansion in scale of use which has characterized most of the other public services. However, if this is not so, the cost constraints we have just developed become mutually inconsistent.

If service is rendered under increasing cost, this implies that marginal cost exceeds average cost. Therefore, if each service classification is charged its marginal cost, no one will be invidiously discriminated against; but revenues in the aggregate will exceed budgeted cost. These facts can be illustrated by a diagram—Figure 3D—and the following simplified data. The construction parallels the case of decreasing unit costs diagrammed in Figure 3A.

	Cost			
Output (Millions)	Total (Thousands) [TC]	Increment of Total (Thousands)	Unit Costs Average [AC]	Unit Costs Marginal [MC]
40	6,900	1,600	17.25¢	16.00¢
50	8,500	1,500	17.00	15.00
60	10,000	1,600	16.67	16.00
70	11,600	1,800	16.57	18.00
80	13,400	2,100	16.75	21.00
90	15,500	2,500	17.22	25.00
100	18,000		18.00	

[3-39] In this example, total cost first increases more slowly than output, and then begins to increase. Beyond the point of minimum average cost, marginal cost rises rapidly above average cost, until at 90 million units, the extreme limit of the range of observation represented by the shading in the diagram, marginal cost is appreciably higher. In fact, the condition of increasing unit cost is characterized and could be defined by a marginal cost exceeding average cost.

The red lines in the figure show that marginal costs as measured by the values of total cost at 70 and 90 million units more than account for the totals. The red line represents observed marginal cost at about 19.5 cents; and if this amount is used as a price, would produce revenues exceeding total cost by about $2 million.

One could not appropriately apply the marginal cost test for rate-making under investor ownership, since profits would substantially exceed necessary levels, and users would clamor for rate reductions so as to bring revenues into line with costs. Marginal costs may, however, serve as a point of reference. In the case of a public enterprise such as the postal service, the excess revenues could be delivered to the public treasury or appropriated to cover low-rate or free service deficits due to undertaking the supply of "public services".

We would accordingly expect to find the budgetary constraint applied in the case of private ownership, and the marginal cost constraint applied under public ownership. Rates would be higher in the latter case, unless offset by lower capital costs and freedom from taxation.

The problem of pricing under increasing cost conditions becomes more complicated if marginal output costs diminish while marginal capacity costs increase with expanding scale of use, or *vice versa*. This matter will be deferred until the nature of marginal cost estimates has been explored in more detail. However, it is probable that the marginal cost constraint would still predominate in the case of public ownership, while the case for its use under private ownership would become indeterminate under certain circumstances.

[3-40] Under conditions of increasing unit costs, the case for discriminatory pricing disappears, because interests of those not benefited thereby are not served by price differentiations which encourage expansion of scale of use. Their interests would dictate that scale of operation be contracted back to the point at which average costs are at a minimum—that is, where average and marginal costs are equal. This is the result which would be reached by the classical idea of an optimal equilibrium. In such case, therefore, it would be unreasonable to permit differences in rates other than those which reflect differences in costs. Use of fully-distributed costs as a basis for rate-making would not be inappropriate for an increasing-unit-cost industry. If later experience or research should indicate that real postal service unit costs, on the whole, do not tend to decrease with increasing scale of use, recourse to an appropriately modified Cost Ascertainment System might provide an adequate formula for rate-making.

3.5 Relating Price to Demand

The foregoing sections of this chapter have dealt with the extent to which the pricing of public services should be constrained by costs to serve. We now consider the limits to pricing policies imposed by the markets for service. Up to this point we have accepted the idea that public services may be offered under classified rate structures and have taken such classifications for granted. We now turn to a consideration of the justification for the classified rate structure from the point of view of the user as well as that of the rate-maker.

3.51 Uses and Users. Because a public service is "public", it is more often than not used by a majority of the population of the area served. The postal service is in this sense probably the most public, since it is used by nearly everyone in the Nation. Most other public services operate in more limited areas but also tend to serve everyone within their operating territories.

[3-41] The wide use of public services by all kinds of people, as well as by business and governmental units, means that incentives to use the service, and advantages gained from such

use, must necessarily vary widely among users. Also, an individual user may have more than one way to use the service. The electric utilities probably have the widest range of uses for the services they render; but all public services appear in some degree to serve a range of different uses for particular users. An individual may have to send out first- and fourth-class mail; a business may from time to time send out or receive mail of all four classes.

The wide range of uses and users implies a wide range of values attached to the availability of a particular public service. For each kind of user or use, there is a separate pattern of demand. We noted that the rate of change of use relative to the rate of change of price (price elasticity) can vary greatly. The variability of consumers' attitudes toward and demand for public services provides a basis for classification and serves to make possible the differential price structures which characterize such services.

3.52 Value of the Service. Since price limits consumption according to the demand pattern, consumers' values of the service place automatic constraints on price. Obviously, no one can long be induced to pay more for a service than he feels it is worth: i.e., his "value of service".

The term "value of service" has had a long history in utility rate-making. Sometimes it has been identified, invidiously, with "what the traffic will bear". Others, as we, have identified the value of service idea with the intensity of consumers' demand. There have been controversies over the legitimacy of "pricing for the market". However, since utilities have normally the obligation to serve all who want the service at a given rate level, service requirements can always be expected to expand up to levels at which marginal demand equals price.

Recognition of different service values for groups of users or uses suggests the desirability of a classified price structure. If customers or their separate uses can be classified, and their willingness to pay exceeds marginal cost, the service can increase its revenues by differentiating [3-42] prices, as demon-

strated by the example of Figure 3B. If the service is operating under decreasing cost conditions, price differentiation may help everyone. The practice of differential pricing affords an opportunity to expand sales of public services under decreasing cost so as to obtain not merely the best practicable utilization of an existing capacity, but also to obtain for all users the benefits of declining capacity-related costs as expanding sales make possible employment of larger and better facilities and plants at lower unit costs.

The users' values of the service are conditioned primarily by the availability and cost of substitutes. For example, if there exists a ready substitute for the mail service for any class of user, as in the case of parcel post, we may find that volume of use is very sensitive to price. As rapidly as the service tends to be priced above a readily available alternative, that alternative will be preferred and the postal service will lose volume and revenues. For such users, the rate cannot be set much above marginal costs. In other words, as substitution becomes possible, demand becomes more elastic. Necessities without substitutes will be bought even if prices become very high. For such goods, changes in price will bring about little change in sales. The ease with which markets for necessities can be made to bear arbitrary price increases has long been noted and has been used as a basis for taxation.

It may help in the appraisal of service value and the consequent definition of a value of service limit for pricing to note the source of such values. Economists have long pointed out that goods and services supply in general either form, time, or location values. In the case of postal service, the form value is of relative unimportance, except where, as in certain legal matters, the use of the mail is specified as a condition for the effectuation of some contractual provision. The important elements of service value for mail users are related to time and location. Translocation of the message gives it a greater value in the hands of the recipient than it had at the hands of the sender. Time value is also of the essence. The greater value of telephone service lies [3-43] primarily in the time that it may

save. Thus, the principal services rendered by the Post Office are to lend form, time and location values to communications. In the case of parcel post, which is simply the transport of merchandise, the Post Office lends primarily location value; although for certain classes of merchandise shipment, as in the case of air parcel post, time may also be important.

What has been said about the nature of location value of messages emphasizes a point which should never be forgotten in dealing with communications: that communications are always double-ended. There is always a sender and a recipient. Since the sender usually pays the postage, the communication must obviously have value to him to justify such payment. It does not follow, however, that recipients also will value the communication—hence, the widespread complaints about "junk mail", which may have an actual "disutility" to some recipients. It is important thus to note that the value of a communication service may be measured in terms of values to the sender, the recipient, or both.

* * * * *

APPENDIX A

GLOSSARY OF RATE-MAKING TERMS

[i] The following definitions are submitted to cover relatively unfamiliar terminology relating to cost-finding and rate-making, with special reference to their use in this report.

Average Cost—The cost per unit obtained by dividing total cost by the number of units of output.

Budgetary Constraint—The economic condition that the total revenue developed by all rates shall be sufficient to produce the funds necessary to keep the enterprise self-sufficient; i.e., that there shall be no long-run persisting failure to cover all costs.

Capacity—The maximum load capable of being carried by a physical unit or system in a period of time related to the operating cycle, such as a number of pieces per hour or pounds handled per day.

Capacity Cost—Those costs which vary with the capacity of the apparatus or system under consideration rather than with the actual output.

Capacity Factor—A measure of the intensity of utilization of a particular capacity in a piece of equipment or an operating system, usually expressed as the ratio between the average load imposed on that unit and the capacity available for carrying load. (Cf. load factor)

Coincidence Factor—A measure of the degree in which the maximum load or capacity requirement of a customer or a group of customers corresponds with the maximum load or capacity requirement of the whole system. It is usually expressed as the ratio of the capacity requirement for which the subject customer or [ii] class is responsible divided by the requirement for which it would have to be responsible if it were the only customer or class served. It is a measure of the advantage users obtain by having their service requirements produced jointly with those of others.

Cost—In economics, a term designating a measure of any obstacle to production, in money terms or in terms of alternate use of the resources expended. The bookkeeping meaning of the term is generally limited to what are normally considered operating expenses and does not include capital return or profit. It is here used in its economic sense unless otherwise modified.

Subordinate definitions are also offered, as follows, which see:

Average cost
Capacity cost
Common (joint and) cost
Decreasing or Increasing cost
Direct cost
Fixed cost
Fixed cost gap
Fully-distributed cost
Increasing (decreasing or) cost
Indirect cost
Joint and common cost
Marginal cost
Out-of-pocket cost
Output cost
Prime cost
Real cost
Variable cost

Cost, Decreasing or Increasing—These terms refer to the direction of change in average costs per unit as the scale of operation changes. If average [iii] costs decrease as the service grows in scope, the service is said to be rendered under decreasing-unit-cost conditions.

Differential Pricing—The practice of establishing different prices for different classifications of the same general type of service.

Direct Cost—Those elements of cost which can be unequivocally related to a particular product or output.

Discriminatory Pricing—A system of pricing different classes of service in which the differentiations need not reflect differ-

ences in costs to serve. Discriminatory pricing is a special case of differential pricing, which see.

Elasticity—This term is used to denote the character of the response of a market to changes in price or other variable affecting quantity sold in such market. Elasticity is defined as the ratio of the proportional change in quantity taken to the proportional change in price: thus,

$$e_p = \frac{\Delta q}{q} \div \frac{\Delta p}{p} = -\frac{p}{q}\frac{\Delta q}{\Delta p}$$

where p and q represent price and quantity sold, and Δp and Δq the respective changes in these variables. Price elasticity is denoted by e_p. It is negative because quantity sold decreases with an increase in price. Revenue will increase if the absolute value of elasticity exceeds unity, and vice versa. See Allen, R. G. D., *Mathematical Analysis for Economists*, esp. pp. 257 *et seq.*

Fixed Cost—The term fixed cost is frequently used instead of capacity cost to indicate costs associated with capital. In this study, the term fixed cost refers only to that element of cost not accounted for when the variability of cost is taken into account. That is, fixed cost equals total cost minus (variable cost times units of output).

Fixed Cost Gap—The amount of a year's revenue requirement not covered by marginal costs for all of the service units expected to be sold; i.e., the amount which has to be raised by rates in addition to marginal costs.

[iv] *Fully-Distributed Cost*—A system of cost analysis in which the totality of costs for a "test year" are allocated to the output of all services for the year. POD's Cost Ascertainment System is an example.

Incremental Cost[1]—Usually defined as the added cost of an added unit of output from a fixed plant. As such, it is equivalent

---

[1] Some economists use the term "marginal cost" for what is here defined as "incremental cost" and *vice versa*.

to short-run marginal cost. Sometimes *long-run* incremental cost is used to signify what is here referred to a long-run marginal cost, which see.

Indirect Cost—Those elements of cost which cannot unequivocally be associated with a particular output or product.

Joint and Common Cost—Costs of two or more products are said to be *joint* if the conditions of production are such that the proportions of output of the various products are a consequence of the production process such that they cannot be freely varied by the operator in response to demands for the separate products. Where it is possible to vary the proportions in which the several products are produced, the costs of the production are termed *common* costs.

Load Factor—A measure of the intensity of the use of a given capacity, usually expressed as the ratio of the average load to the peak load.

Marginal Cost[1]—The marginal cost is here defined as the added unit cost for added business. It is expressed as a rate per unit of some relevant output.

> *Short-run*—The short-run marginal cost usually denotes added costs for added outputs starting with a given output, and does not contemplate taking into account future changes or capacity additions (Cf. Incremental Costs).
>
> *Long-run*—Long-run measures of marginal cost require consideration of full changes in total costs per unit of added output, taking into account all long-run requirements to serve the added output, including capacity additions. The measure has been referred to elsewhere as "full additional cost of added business". In its application to rate design matters, the long-run is necessarily forward looking—prospective—so that [v] the measure may be defined as the long-run planned-for rate of increase in total annual cost per unit of anticipated added business.

---

[1] Some economists use the term "marginal cost" for what is here defined as "incremental cost" and *vice versa*.

Marginal Cost Constraint—The economic conditions that no price or rate for a particular service be set below the long-run marginal cost estimated for that service.

Natural Monopoly—This term applies in a situation where service is produced under conditions in which there would be waste of capital or other resources if competition between two or more enterprises were permitted. In such cases, domination of the field by one enterprise is the usual outcome.

Out-of-Pocket Cost—The added cash outlay necessary to obtain added output; generally, a synonym for *incremental* cost, which see.

Output Cost—Used to signify the unit cost of obtaining an additional unit of output from a given piece of apparatus or operating system. As such, it is frequently termed incremental cost; but incremental cost may include the provision of added capacity if present capacity is fully utilized.

Parameter—A measure in physical terms of the quantity of output or sales to which costs in dollars or charges for the service may be related or in terms of which they are computed.

Peak Load—The maximum load handled in a stated period of time related to the operating cycle (day, week, year).

Peak Responsibility—A measure of the extent to which a particular customer or class contributes to the peak load and hence the capacity requirement in any apparatus or operating system.

Planning Horizon—A period of time over which forecasts of output and costs are considered in rate-making.

Public Good—A good or service produced and used under conditions in which use by one person cannot be shown to affect significantly the resources employed in its production or maintenance, or the enjoyment thereof by other persons.

[vi] *Public Service*—This is a term of art in the postal establishment to designate rate categories where revenues do

not cover costs allocated under the Cost Ascertainment System, and where the unsupported portion of the costs is covered by a special appropriation by Congress. More generally, public service refers to an activity undertaken on behalf of the public subject to special obligations and controls in the public interest.

Revenue Requirement—The aggregate amount necessary to be realized in an operating cycle (usually, twelve months) in order to cover all of the costs associated with operations throughout that cycle, including costs of capital.

Service Classification—A classification of users or uses for the purpose of application of prices in a differential pricing system.

Value of Service—A term of art in rate-making, designating the price at which a homogeneous group of users will take a given quantity of the service in question. It is approximately equivalent to the economists' idea of consumers' demand.

Variable Cost—That portion of total cost representing variation, within a limited range of observation, in total cost with changes in scale of operation, output, or other parameter of variation. It is frequently identified with output cost, expense, or costs other than for the use of capital.

Petitioner's Reply Brief

1

FILED
NOV 10 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304, 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

REPLY BRIEF OF PETITIONER NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS

MATTHEW S. PERLMAN
Counsel of Record
RICHARD J. WEBBER
CORALYN G. MANN
ARENT, FOX, KINTNER, PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6279
Counsel for Petitioner National Association of Greeting Card Publishers

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. THE LEGISLATIVE HISTORY OF THE POSTAL REORGANIZATION ACT CONFIRMS THE REQUIREMENT OF MAXIMUM COST-OF-SERVICE ALLOCATIONS	2
A. The House Bill's Rate Floor Was Not Defined	3
B. Maximum Cost-Of-Service Allocation Was An Implicit Requirement Of The Senate Bill	4
C. The Senate Bill Prevailed In Conference	5
D. The Statement Of The Managers On The Part Of The House Conflicts With The Conference Bill	6
II. NAGCP ADVOCATES NEITHER A FULLY-ALLOCATED-COST SYSTEM NOR A SYSTEM THAT GIVES NO WEIGHT TO OTHER STATUTORY FACTORS	9
III. RESPONDENTS SEEK A RATE FLOOR WHICH DOES NOT INCLUDE ALL CAUSALLY-RELATED COSTS	10
A. The Postal Service's Concession That A Rate Floor Must Comprise More Than Short-Term Variable Costs Is Significant, But Insufficient	11
B. A Rate Floor Limited To Long-Run Variable Costs Does Not Satisfy The Act's Command For Maximum Cost-Of-Service Allocation	12
C. Less Than Maximum Causal Attribution Invites Cross-Subsidization	14
IV. BECAUSE SERVICE-RELATED COSTS ARE NOT CAUSED BY ANY CLASS, THE ALLOCATION THEREOF TO FIRST-CLASS IS ARBITRARY AND SHOULD BE STRUCK DOWN BY THIS COURT	15
V. RESPONDENTS' DEFERENCE ARGUMENT IS MISPLACED	18
CONCLUSION	19

TABLE OF AUTHORITIES

CASES: Page

Baltimore & Ohio Railroad Co. v. *Aberdeen & Rockfish Railroad Co.*, 393 U.S. 87 (1968) 12, 17

Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U.S. 581 (1945) 13

Cudahy Packing Co. v. *Holland*, 315 U.S. 357 (1942) . 7

Davidson v. *Gardner*, 370 F.2d 803 (6th Cir. 1966) ... 8

Federal Election Commission v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981) 18

Lewis Publishing Co. v. *Morgan*, 229 U.S. 288 (1913) . 14

National Association of Greeting Card Publishers v. *United States Postal Service*, 569 F.2d 570 (D.C. Cir. 1976) *vacated as to other issues*, 434 U.S. 884 (1977) 8, 10, 12, 18

National Association of Greeting Card Publishers v. *United States Postal Service*, 607 F.2d 392 (D.C. Cir. 1979) *cert. denied*, 444 U.S. 1025 (1980) 16, 17

Udall v. *Tallman*, 380 U.S. 1 (1965) 18

STATUTES:

39 U.S.C. § 3622(b)(3) ..... *passim*

OTHER:

116 Cong. Rec. 21708 (1970) 5

121 Cong. Rec. 30784 (1975) 8

124 Cong. Rec. 8859 (1978) 8

H.R. 11750, 91st Cong., 1st Sess. (1969) 3

H.R. 7700, 95th Cong., 2d Sess. (1978) 8

S. 3613, 91st Cong., 2d Sess. (1970) 5

S. 3842, 91st Cong., 2d Sess. (1970) 5

A. Kahn, *The Economics of Regulation: Principles and Institutions* (1970) 10

Hearings on S. 3613 Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 4, 5

Table of Authorities Continued

Page

Postal Rates and Revenue and Cost Analysis: Hearings Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service, 91st Cong., 2d Sess. (1970) 4

Hearings on H.R. 4 and H.R. 11750 Before the Senate Comm. on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 4, 8

Proposals to Reform the Postal Service: Hearings on H.R. 4 and H.R. 11750 Before the House Comm. on the Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 3, 4, 8

Towards Postal Excellence: The Report of The President's Commission on Postal Organization (1968) 2, 3, 4, 6, 7, 13, 14

The essence of the dispute between the parties is whether all causally-related costs or, instead, just those whose causal relationship is shown by a currently available volume variability study, must be attributed to each class of mail. NAGCP contends that the Act requires the former course. If the Commission is permitted to attribute fewer than all causally-related costs, then section 3622(b)(3) loses all real meaning, and cross-subsidization will continue.[1]

SUMMARY OF ARGUMENT

1. Respondents misconstrue the legislative history of the Act's costing provision. The House bill did not include a firm rate floor, and the meaning of the term "costs demonstrably related" was not clear. The Senate bill's more inclusive language reflected the intent that each class pay its own way. In conference, the Senate bill prevailed and was improved in that the rate floor implicit in the Senate bill was made explicit. The Statement by the Managers on the Part of the House has no credibility.

2. NAGCP does not advocate a return to fully allocated costs. A significant amount of the Postal Service's institutional costs are to be distributed according to the non-cost factors of the Act. However, many costs for which a reasonable causal inference can be drawn are currently not being attributed. To require their causal allocation is not to support fully allocated costs.

3. The Postal Service erroneously asserts that attribution of currently identifiable volume variable costs satisfies the requirement of section 3622(b)(3) of the Act. Although the Postal Service concedes that the rate floor must include long-

---

[1] In a concurring opinion to the Commission's Opinion and Recommended Decision Upon Reconsideration (June 14, 1981), former Commission Chairman Fritschler wrote that a 20 cent first-class rate would result in cross-subsidization of other classes by first-class. *Id.* Fritschler, concurring at 2-3. Subsequently, the Governors of the Postal Service unilaterally raised the first-class rate to 20 cents. (NAGCP Br. at 14 n.18).

run as well as short-run variable costs, this concession is insufficient to assure that Congress' intent is carried out. If causal inferences may reasonably be drawn, the Commission must allocate the relevant costs even in the absence of a variability study.

4. Service-related costs ("SRC")[2] have no causal basis, particularly since Congress now requires six-day-a-week delivery. Without a causal basis, the SRC methodology is arbitrary and capricious.

5. No deference need be given to an administrative decision that is inconsistent with the statute and contrary to Congress' intent. Moreover, the Commission's actions have not been consistent with its own interpretation of the Act.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE POSTAL REORGANIZATION ACT CONFIRMS THE REQUIREMENT OF MAXIMUM COST-OF-SERVICE ALLOCATIONS

Nothing in the language of 39 U.S.C. § 3622(b)(3) or any other provision of the Act qualifies or conditions the "requirement" of section 3622(b)(3) that "each class of mail . . . bear the direct and indirect postal costs attributable to that class." The plain meaning of that section is that all costs caused by a class must be attributed to that class (NAGCP Br. at 17).

Respondents seek to overcome the plain meaning of section 3622(b)(3) by reading in limitations allegedly derived from the legislative history. Their view of the Act's legislative history may be described as follows: The House explicitly adopted the costing recommendations of the Kappel Commission,[3] in par-

---

[2] The service-related cost concept is described in NAGCP's Brief at 10-12.

[3] *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* (1968) ("*Kappel Commission Report*"). Portions of this Report are reprinted in the Legis. J.A. at 2-40.

ticular the rate floor based on volume variable costs. The Senate bill was weaker in its cost-of-service allocation requirements because it did not establish a rate floor. In conference, the House bill prevailed, but the "costs demonstrably related" language was changed to "direct and indirect postal costs attributable" to clarify the House's intent. (USPS Br. at 27-38; Newsweek Br. at 28-34).

This scenario cannot withstand critical analysis.

A. The House Bill's Rate Floor Was Not Defined

Respondents rely heavily on the House bill's use of the term "costs demonstrably related," a term from the *Kappel Commission Report*. (USPS Br. at 27-31; Newsweek Br. at 28-30). However neither the Postal Service nor the House was willing to embrace fully the *Kappel Commission Report's* concept or definition of demonstrably related costs.

For its part, the House undercut the Kappel Commission's rate floor by including the following provision in its bill:

> Notwithstanding the other provisions of this section, in making changes in the structure of its rates, the Postal Service shall take into account the financial impact upon affected users of the various classes of the mail and, at its discretion, may achieve the policy goals of this section over a duration of time appropriate in view of such financial impact.

H.R. 11750, 91st Cong., 1st Sess. § 1201(d) (1969). Several Congressmen recognized that this provision would allow a continuation of the below-cost rates enjoyed by second- and third-class mail.[4] Rep. Udall appeared to favor such a result. *1969 House Hearings* at 667-71, Legis. J.A. at 78-82.

---

[4] *Proposals to Reform the Postal Service: Hearings on H.R. 4 and H.R. 11750 Before the House Comm. on the Post Office and Civil Service*, 91st Cong., 1st Sess. 507, 621-22, 813 (1969) [hereinafter cited as *1969 House Hearings*], portions reproduced in Legis. J.A. at 67, 72-73.

The Postal Service was unwilling to commit itself to the *Kappel Commission Report's* definition of demonstrably related costs. Postal Service witnesses defined the term variously as "directly traceable," *id.* at 509, "incremental," *id.* at 342, 359, Legis. J.A. at 63-64, and "direct cost with some variation," *Hearings on S. 3613 Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 1419 (1970). On one occasion, Postmaster General Blount expressed an unwillingness to define the term, so as not to "shackl[e] future generations to any particular economic theory."[5] *1969 House Hearings* at 1273, Legis. J.A. at 91.

B. Maximum Cost-Of-Service Allocation Was An Implicit Requirement Of The Senate Bill

By contrast, the Senate bill's costing provision was far more inclusive. Consonant with Senate Post Office and Civil Service Committee Chairman McGee's expressed objective not to have first-class mail pay the costs of other classes,[6] the Senate bill,

---

[5] The Postal Service points to a precise definition of demonstrably related costs given by Assistant Postmaster General Hargrove in certain 1970 House hearings (USPS Br. at 30). Those hearings, however, are *not* part of the legislative history of the House bill. Rather, they were held for the sole purpose of discussing the Post Office's new Revenue and Cost Analysis report, which did define the term demonstrably related costs. *Postal Rates and Revenue and Cost Analysis: Hearings Before the Subcomm. on Postal Rates of the House Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 1-3 (1970), Legis. J.A. at 118-20.

[6] *See Hearings on H.R. 4 and H.R. 11750 Before the Senate Comm. on Post Office and Civil Service*, 91st Cong, 1st Sess. 509-18 (1969) [hereinafter *1969 Senate Hearings*]. For example, in a colloquy with Postmaster General Blount, Sen. McGee stated:

> It would raise the question of how we protect [individual first-class] mailers against carrying the heaviest burdens of the Department. That is the reason we want to make sure on this committee how distinctly those [costing] lines are drawn.

Id. at 10, Legis. J.A. at 147. Contrast this concern with Rep. Udall's comments in the House as to which classes should be subsidized and which should make a profit. *1969 House Hearings* at 662-70.

S. 3613, 91st Cong., 2d Sess. (1970), Legis. J.A. at 251, required rates to reflect

> the amount of operating costs, overhead and other institutional costs of the Postal Service properly attributable to each class of mail based on and in proportion to its share of mail volume and its overall effect upon the postal system.

The subsequent version, S. 3842, 91st Cong., 2d Sess. (1970), Legis. J.A. at 263, had slightly different language:

> (3) operating costs, the amount of overhead, and other institutional costs of the Postal Service properly assignable to each class of mail or type of mail service . . . .

The different language, however, was not intended to change the coverage of the provision. 116 Cong. Rec. 21708 (1970), Legis. J.A. at 349.

It is evident from the language used that the Senate intended attribution thereunder to be as inclusive as possible; more inclusive language is difficult to conceive. The specific references to "operating costs" and "overhead" and "institutional costs" were designed to assure maximization of causal allocations.

Respondents deprecate this costing provision as a "precatory admonition" (USPS Br. at 34) and lacking "an explicit rate floor" (Newsweek Br. at 31). They fail to recognize that a rate floor was implicit in the Senate's broader language. The Senate's concern that first-class mail not cross-subsidize other classes would have required interpretation of the Senate bill as establishing a rate floor. Those Senators who criticized the bill for not explicitly requiring a rate floor (*see* USPS Br. at 34) correctly identified a defect in draftsmanship, which was corrected in conference.

C. The Senate Bill Prevailed In Conference

Respondents' assertion that the House's costing provision prevailed in conference is disproved by a convincing accumulation of facts:

a) The critical language of the House bill, "costs demonstrably related," was dropped;

b) Section 1201(d) of the House bill, permitting continuing cross-subsidization of certain classes, was dropped;

c) The conference bill used the terms "attributable" and "assignable," both of which derive from the Senate bills;

d) The conference bill's use of the words "direct and indirect" costs is comparable to the Senate bill's specification of "operating costs, the amount of overhead, and other institutional costs"; and

e) The Senate bill's listing of criteria in separate, numbered paragraphs was very close both in form and substance to the conference bill. (*See* NAGCP Br. at 3-4, 20-25).

The addition of the word "requirement" in the conference bill simply made explicit what had been implicit in the Senate's bill. This addition corrected the defect in draftsmanship which had been noticed in a comparison of the two bills.

D. The Statement Of The Managers On The Part Of The House Conflicts With The Conference Bill

Respondents argue that the "Statement of the Managers on the Part of the House" ("House Statement") cannot be disregarded despite its erroneous reference to a rate floor consisting of short-term variable costs (USPS Br. at 38-42; Newsweek Br. at 34-38). The argument is not persuasive.

Respondents Newsweek and Time ("Newsweek") assert that the distinction between short- and long-run costs is "largely one of semantics" (Newsweek Br. at 37 n.44). This is incorrect. The difference between short-run and long-run variable costs affects more than simply the planning period chosen. As discussed at length in the study for the Kappel Commission by the Foster Associates, Inc. ("*Foster Associates Report*"),[7]

---

[7] *Toward Postal Excellence: Report of the President's Commission on Postal Organization*, II Annex, (Contractors' Reports) (1968) (portions reproduced in Legis. J.A. at 41-54).

long-run variable costs include not just the short-run cost of an additional unit but also "reasonable allowances for increases in related overheads and indirect costs."[8] *Foster Associates Report* at 3-36, Legis. J.A. at 40; *see generally id.* at 3-31 through 3-38, Legis. J.A. at 47-53; App. A, iv-v. In a decade of ratemaking under the Act, short-run variable costs have consistently comprised only about 50% of postal costs (NAGCP Br. at 5, 7); in the present proceeding the figure is 51%. J.A. at 294a-295a. Using long-run variable costs, however, the Commission in this proceeding attributed an additional 13% of total costs. J.A. at 295a. Clearly, the attribution of long-run variable costs is extremely significant in postal ratemaking.

The Postal Service speculates that the House Statement's reference to short-run costs was only directed at the then-current state of Post Office costing (USPS Br. at 40 n.36). There is no record support for this speculation. The Statement, and Rep. Udall's similar remarks, purport to interpret the statute. The error with regard to short-run costs seriously damages the overall credibility of these interpretations.

Respondents also assert that, aside from the phrase "short term," the House interpretations are consistent with the legislative history (USPS Br. at 40 n.36, 42; Newsweek Br. at 38). To the contrary, the House interpretations are inconsistent with the legislative history. First, the interpretations are plainly a face-saving exercise; Rep. Udall states that all conferees agreed on "demonstrably related costs" as the desired benchmark for costing but fails to give any explanation why, therefore, the term was excluded from the final bill. It made no sense to discard the key costing phrase if, as Rep. Udall claimed, all conferees agreed on its meaning and appropriateness. *Cf.*, *Cudahy Packing Co.* v. *Holland*, 315

---

[8] Foster Associates preferred the term "long-run marginal costs" to "long-run variable costs." *Id.* The Kappel Commission used "long-run variable costs" to mean the same thing. *Kappel Commission Report* at 131, Legis. J.A. at 19.

U.S. 357, 366-67 (1942) (a change of language in conference is strong evidence of an intended change in substance). Clearly, the House failed to get its costing provision adopted in conference. Further, Rep. Udall's claim that the "principle of the House bill" prevailed ignores the fact that the rate floor in the House bill left an escape hatch in section 1201(d) for cross-subsidization by first-class mail, and the conference bill did not include that provision either. Lastly, the precise definition of "attributable costs" proffered in the House Statement has no antecedent in the legislative history, but rather is derived from the definition of "demonstrably related costs" in the Post Office's Revenue and Cost Analysis report for Fiscal Year 1969, which was the subject of other hearings (*see* note 5, *supra;* USPS Br. at 40 n.36). As stated above, Postmaster General Blount did not want to be bound to a specific definition of "demonstrably related costs."[9]

For the above reasons, the House interpretations do not reflect the actual legislative intent and must be disregarded. *See, e.g., Davidson* v. *Gardner*, 370 F.2d 803, 828 (6th Cir. 1966).[10]

---

[9] Rep. Udall was a supporter of cross-subsidization—he believed that first-class should subsidize the rates for the other classes. *See 1969 House Hearings* at 667-71 Legis. J.A. at 78-82. In this respect, Udall was at cross-purposes with a majority of the members of Congress. *See, e.g., 1969 House Hearings* at 49, 193, 210, 507, 621-22, 813, 891; *1969 Senate Hearings* at 509-18, portions reproduced in Legis. J.A. at 55, 58, 67, 72-73, 85, 146-52.

[10] Respondents argue incorrectly that Congressional actions subsequent to passage of the 1970 Act support the Second Circuit's decision (USPS Br. at 42-44; Newsweek Br. at 38-40). The twice-introduced amendment which, respondents contend, would have endorsed *NAGCP I* failed on both occasions primarily because it had both times been introduced on the House floor without opportunity for prior review by the House Committee. 121 Cong. Rec. 30784 (1975); 124 Cong. Rec. 8859 (1978). On neither occasion did the Senate consider the amendment. H.R. 7700, 95th Cong., 2d Sess. (1978), which would have set a 60% ceiling on cost attribution, contained a provision freezing first-class rates for individuals through

II. NAGCP ADVOCATES NEITHER A FULLY-ALLOCATED-COST SYSTEM NOR A SYSTEM THAT GIVES NO WEIGHT TO OTHER STATUTORY FACTORS

The Postal Service's well-worn response to any attempt to urge greater attribution levels is to equate that attempt with a return to the discarded fully-allocated-cost system. This proceeding is no exception. (USPS Br. at 8 n.12, 24 n.18; Newsweek Br. at 45).

NAGCP does not advocate a fully-allocated-cost system. In a fully-allocated-cost system, allocated costs need not be causally-related to the mail classes; NAGCP's objective, on the the other hand, is that all costs which *are* causally-related to a class be attributed to that class. Respondents argue that if non-volume variable costs are attributed on a causal basis, the other factors in the statute will have no meaning. This is incorrect. The Postal Service has, and will always have, significant amounts of traditional overhead-type costs which cannot be attributed. These costs are found in such cost segments as postmasters, miscellaneous operating costs, research and development, and general management systems. *See* 2d Cir. J.A. Vol. V, App. J at 2, 188, 242, 251. Other areas of institutional costs no doubt exist. These costs are intended under the Act to be allocated in accordance with non-cost factors.

If section 3622(b)(3) is interpreted, as respondents urge, to mean that only some causally-related costs will be considered part of the rate floor, then that floor—the "requirement . . . that each class of mail . . . bear the direct and indirect postal costs attributable to that class"—is effectively eliminated.

The Postal Service criticizes the D.C. Circuit and NAGCP for alluding favorably to the efforts by Chief Administrative

---

FY 1982. The bill thus had "something for everyone." Finally, Congress has had over four more years to overturn *NAGCP I* and has not done so.

Law Judge Wenner to attribute costs where variability studies were lacking; it is argued that Wenner espoused fully allocated costs (USPS Br. at 8 n.12). The Postal Service forgets that Wenner attributed only 70.6% of total postal costs, less than the percentage recommended by the Officer of the Commission (77.4%), and only a few percentage points more than the Commission attributed in this proceeding using long-run variable costs. *See National Association of Greeting Card Publishers* v. *United States Postal Service*, 569 F.2d 570, 590 n.81 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) [hereinafter, *NAGCP I*]. While Wenner's causal approximations were at times rough, he was the first to so admit, and he pointed to the need for future improvements. *Id.* at 581.[11] The significance of Wenner's opinion, as expressed by the D.C. Circuit, was his recognition of the need to go beyond variability analysis when additional causal relationships are apparent. This openness to allocations not based strictly on available variability studies is a far cry from fully allocated costs.

III. RESPONDENTS SEEK A RATE FLOOR WHICH DOES NOT INCLUDE ALL CAUSALLY-RELATED COSTS

The Postal Service states that neither it nor the Commission "has ever denied that direct and indirect costs that can be shown to be caused by a particular class of mail must be attributed to that class" (USPS Br. at 18). For the Postal Service, however, the only costs that "can be shown to be caused" by a mail class are volume variable and "specific

---

[11] A rough approximation based on causation is preferable to throwing the costs into the institutional category. As stated in A. Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. I at 78 (1970):

> The cost allocation formulae actually employed may achieve only a rough, rule-of-thumb approximation to the actual costs for which each product or service is responsible, but those costs have objective reality.

fixed"[12] costs. (USPS Br. at 20 *passim*). The result is less than the maximum cost-based allocations required by the Act.[13]

A. The Postal Service's Concession That A Rate Floor Must Comprise More Than Short-Term Variable Costs Is Significant, But Insufficient.

The Second Circuit's opinion requires only that short-term variable costs be attributed. That court held:

> And as to the level of attribution required, we conclude that the definition of that term in the Conference Committee report [*i.e.*, "a floor for each class of mail equal to costs . . . that vary over the short term in response to changes in volume" or specific fixed costs] is controlling.

Pet. for Cert. No. 81-1304, App. A at 27a; *see also id.* at 25a. Notwithstanding that holding, the Postal Service concedes that the Act requires attribution of long-run as well as short-run variable costs (USPS Br. at 20). Newsweek asserts that there is no meaningful distinction between short-run and long-run costs (Newsweek Br. at 37 n.44). In fact, there is a significant difference between short-run and long-run variable costs;

---

[12] The Postal Service's narrow definition of specific fixed costs—those fixed costs which are exclusively related to a particular class—makes the attribution of these costs almost meaningless.

[13] There is considerable discussion in the briefs whether the statute requires two- or three-tier allocation. While NAGCP is inclined to believe that UPS and the D.C. Circuit are correct that the statute requires three-tier allocation—attribution of costs caused by a class, assignment of costs based on reasonable cost inferences, and finally, allocation based on other statutory factors—NAGCP sees little or no difference between attribution of costs and assignment of costs on a reasonable inference basis. The assignment language is largely redundant if the UPS and D.C. Circuit interpretation is correct. But if respondents are correct, it matters little because the attribution requirement alone requires causal allocation by all reasonable means.

it is not just the time period which differs, but the nature of the costs considered. *See* notes 7-8 *supra* and accompanying text.

The inclusion of long-run variable costs in the rate floor is, to be sure, only a partial step in maximizing attribution, but it is a significant step which this Court's opinion should unambiguously mandate. The failure of the Second Circuit to do so is reversible error.

B. A Rate Floor Limited To Long-Run Variable Costs Does Not Satisfy The Act's Command For Maximum Cost-Of-Service Allocation

In *NAGCP I*, the D.C. Circuit criticized the Commission for the latter's unwillingness to utilize estimates or approximations of causality in the absence of variability data. 569 F.2d at 581. The same criticism is applicable to the Commission's decision in this case. Respondents have largely ignored the Commission's failure to maximize causal allocations; instead, respondents have attempted to divert attention from this issue by arguing incorrectly that estimates or approximations ignore causality.

As shown in NAGCP's initial brief, variability studies have no exclusive claim to truth or accuracy (NAGCP Br. at 27-28). In this proceeding, the Postal Service proposed, with limited success, radical changes in previous variability analyses pursuant to which large amounts of costs theretofore determined to be variable were claimed to be institutional (*see* NAGCP Br. at 28). If a cost deemed to be variable in one proceeding can be treated as institutional in the next, it is apparent that even with the most detailed variability studies, there is no assurance of a correct result. Thus, the Commission cannot justify less than maximum cost attribution on the ground that volume variability studies alone insure adequate tracing.[14]

---

[14] This Court has recognized that cost allocation is not an "exact science" and that reasoned approximations of cost causality may be necessary in ratemaking. *See Baltimore & Ohio Railroad Co.* v.

Moreover, as NAGCP's witness Cicchetti testified, the Postal Service's claimed percentage of institutional costs is "extraordinary" and likely to be greatly overstated. Postal Rate Commission R80-1 Record, at R. 9383, 9395. The shortfalls in attribution are primarily within the transportation and carrier cost segments, areas in which first-class mail's lower weight and cubic volume characteristics would bear favorably on its relative cost burden (*see* NAGCP Br. at 29-31).

The Commission's failure to attribute all causally-traceable costs is particularly evident in the transportation area. The *Foster Associates Report* estimated that 90-95% of transportation costs are variable.[15] No distinction between purchased and in-house transportation was made in that regard (both categories were mentioned in the *Report*). Testimony from transportation experts during the Commission's hearing echoed the *Report's* conclusion that transportation costs should be almost entirely variable (*see* NAGCP Br. at 30). The Commission itself stated that the suggestion by these experts of greater variability than adduced by the Postal Service "appears promising." 2d Cir. J.A., Vol. V, App. J. at 186. But in the absence of a variability study, the Commission refused to make reasonable estimates. 2d Cir. J.A., Vol. V, App. J. at 183, 184-86. As a result, in cost segments which the *Foster Associates Report* had stated were 90-95% variable, the Commission

---

Aberdeen & Rockfish Railroad Co., 393 U.S. 87, 92 (1968); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 589 (1945). While, as noted by the Postal Service (USPS Br. 25 n.20), most judicial opinions in the ratemaking area have necessarily involved fully allocated costing, this fact in no way detracts from judicial recognition that cost-based allocations need not be precise to be meaningful.

[15] "All of [transportation cost] is undoubtedly relatively variable with the mail load . . . . On balance, we believe that transportation function costs are from 90 to 95 percent variable . . . ." *Foster Associates Report* at 5-9.

attributed only 16.1% (Cost Segment 8) and 39.9% (Cost Segment 12), respectively. 2d Cir. J.A., Vol. V, App. J at 127, 186. Had reasonable approximations been made, as required by the Act, first-class mail would have been the beneficiary (*see* NAGCP Br. at 30-31).

Reasonable inferences of causation can lead to further cost allocations in the rural and city delivery carriers segments as well. Adequate cost-of-service allocations, as required by the Act, cannot be achieved without such estimates. A rate floor consisting solely of long-run variable costs falls short of the "requirement that each class of mail . . . bear the direct and indirect postal costs attributable to that class." 39 U.S.C. § 3622(b)(3).

C. Less Than Maximum Causal Attribution Invites Cross-Subsidization

In this proceeding 55% of attributed costs fell on first-class. J.A. at 294a-295a. The Postal Service proposed, however, to burden first-class with almost 67% of all institutional costs, J.A. at 45a, enough to increase the first-class rate by 1.6 cents over the rate which would have resulted from a 55% share comparable to the cost share based on causation. J.A. at 168a.

The overburdening of first-class with institutional costs or SRC is but a continuation of pre-Act practices. As noted in the *Kappel Commission Report* at 31, only first-class mail paid its fully allocated costs under the Post Office's Cost Ascertainment System. Second-class mail (magazines and newspapers) paid only 26% of its costs in Fiscal Year 1968. Cross-subsidization was a recognized practice as far back as 1913. *See Lewis Publishing Co.* v. *Morgan*, 229 U.S. 288, 303-04 (1913).

Given the opportunity, the Postal Service will almost inevitably cross-subsidize its competitive mail classes by overpricing its monopoly class so that it maximizes the range and volume of its activities. The Postal Service's desire to maximize mail volume is openly expressed; the Governors

have recently stated that total mail volume is "possibly the best index of how useful the postal system is to the nation." Pet. for Cert. No. 81-1304, App. B. at 6b.

The Postal Service's view that volume maximization is desirable has no basis in the statute and discriminates against mailers who are overcharged so that other mailers can be charged less to increase volume. The Postal Service suggests that this discrimination is justifiable because the public pays for postal costs whether in the form of subscription costs for a magazine, higher priced merchandise ordered from a direct mailer, or the postage paid to mail a letter (USPS Br. at 49). But the individual who mails a letter may not be the same individual who subscribes to a magazine.

The unjustified aim of volume maximization should not be confused with the justifiable practice of not pricing a class of mail so high that it will make a lower contribution to institutional costs than it would have made with lower rates. NAGCP does not advocate setting rates of second-, third-, and fourth-class mail so high that reduced volume at the higher rates actually reduces contribution to institutional costs. Demand for all classes of mail is inelastic, 2d Cir. J.A., Vol. V, App. H at 9, and there is no suggestion in the record that any rates suggested by any party, including the Officer of the Commission who proposed a comprehensive alternate rate schedule, would have this effect.

IV. BECAUSE SERVICE-RELATED COSTS ARE NOT CAUSED BY ANY CLASS, THE ALLOCATION THEREOF TO FIRST-CLASS IS ARBITRARY AND SHOULD BE STRUCK DOWN BY THIS COURT

The Commission skewed non-causally-related costs to the detriment of first-class mail by utilizing the SRC concept. An incredible 88% of SRC fell on first-class, enough to raise the first-class rate by one cent over a causally-determined rate (NAGCP Br. at 36).

Direct Mail/Marketing Association, Inc. ("DMMA") argues that the SRC methodology is an appropriate costing technique and should be upheld (DMMA Br. at 36-40). The Postal Service and Newsweek do not favor the methodology, but state either that its use is within the Commission's discretion (USPS Br. at 44-48) or that the Commission should first be given the opportunity to renounce the concept in a subsequent proceeeding (Newsweek Br. at 47-50). Each of these views is in error.

The linchpin of the SRC methodology is that the "preferential classes" *cause* six-day a week delivery rather than three-day a week delivery, 2d Cir. J.A., Vol. IV at 148. If this is not true, then there is no causal basis whatsoever for allocation of SRC to the "preferential" classes, and the concept is wholly arbitrary, capricious, and unduly discriminatory to first-class mail.

In the prior rate proceeding, Docket R77-1, the Postal Service produced testimony sufficient for the Commission to conclude that preferential mail caused six-day a week instead of three-day a week delivery. *National Association of Greeting Card Publishers v. United States Postal Service*, 607 F.2d 392, 407 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) [hereinafter, *NAGCP III*]. In the current docket, however, the Postal Service abandoned the concept, and when asked by written Commission inquiry the reason, the Postal Service stated that the entire six-day/three-day construct was without basis. J.A. at 38a.

Without any warning to the Postal Service or other parties that such a course was under consideration,[16] the Commission issued its decision resurrecting the concept. The Governors then made it unmistakeably clear in their decision accepting the Commission's recommendations under protest that there

---

[16] The lack of notice helps to explain the paucity of testimony on the subject in R80-1.

was no causal connection. Pet. for Cert. No. 81-1304, App. B at 12b-14b. Thereafter, Congress passed a statute which prohibits any variation from the six-day delivery schedule. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Section 1722, 95 Stat. 759.

Not only is there no causal basis for SRC, but no deferred first-class rate exists for individuals who would be willing to forego "preferential" service for a lower rate. In upholding the Commission's rejection of the deferred rate in R77-1, the court in *NAGCP III* (Tamm, J.) stated:

> Our affirmation of the PRC's rejection of this CRM[17] proposal does not imply that future CRM proposals, supported by a fuller, more substantial record, should be rejected. By contrast, we echo Chairman DuPont's encouragement to the Postal Service to restudy the CRM concept and offer a new proposal in future proceedings.

NAGCP III, 607 F.2d at 424. Despite Judge Tamm's encouragement, no new proposal has since been offered. As a result, first-class users who would not choose the additional cost of a six-day a week delivery of letters must pay extra, while third-class mailers pay less because delivery costs are shifted to first-class. Yet, third-class mailers receive the benefit of the six-day a week delivery.

In sum, first-class is burdened by $1.62 billion in costs based on a purported causal relationship which does not exist. This is the essence of arbitrary administrative action, and this Court has the duty to bar the use of the SRC methodology. *Baltimore & Ohio R.R. Co.* v. *Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87, 92 (1968).

---

[17] "CRM" was the acronym used for "citizens rate mail," the proposed deferred service for individual mailers.

V. RESPONDENTS' DEFERENCE ARGUMENT IS MISPLACED

Respondents argue that this Court should defer to the agencies' interpretation of section 3622(b), citing *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) and other similar holdings (USPS Br. at 20; Newsweek Br. at 21-24). The principle regarding deference does not apply where the agency's interpretation is "inconsistent with the statutory mandate" or would "frustrate the policy that Congress sought to implement." *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

NAGCP submits that the administrative implementation of section 3622(b)(3) has been inconsistent with the statute and Congress' intent. But there is an additional shortcoming in respondents' argument. In the first rate proceeding, Docket R71-1, the Commission stated "that the statute—far from requiring any particular method—actually envisions consideration of *all* appropriate costing approaches." PRC Opinion in R71-1 at 46; quoted at J.A. 297a (emphasis added). The *NAGCP I* decision was wholly consistent with this interpretation of the statute by the Commission. It was the Commission's *implementation* of the statutory requirement which was so inadequate that the D.C. Circuit felt compelled to act. Indeed, the Second Circuit's decision below conflicts with the Commission's interpretation by interpreting the Act as requiring only a "particular method," *i.e.*, short-run variable cost analysis.

In the Commission's decision under review in this proceeding, the Commission has repeated that all methodologies will be considered. 2d Cir. J.A., Vol. IV at 129-30. Nevertheless, in its implementation the Commission has effectively restricted causal allocations to costs included in a variability study.

It is therefore problematical what the result should be in the event that the principle of deference is applied. If respondents' position is that deference is owed to what the Commission has done rather than what it has said, then NAGCP cannot agree; the Commission has failed to carry out the plain meaning of the statute.

CONCLUSION

Maximizing causal allocations is the key to preventing the cross-subsidization of other classes by first-class mail. The 1970 Act was intended to achieve that goal. Because the Second Circuit's decision conflicts with the Act and legislative intent, it must be reversed.

Respectfully submitted,

MATTHEW S. PERLMAN
Counsel of Record
RICHARD J. WEBBER
CORALYN G. MANN
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1815 H Street, N.W.
Washington, D.C. 20006
(202) 857-6279
Counsel for the National Association of Greeting Card Publishers

Petitioner's Reply Brief

2

Office - Supreme Court, U.S.
FILED
NOV 18 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

October Term, 1981

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER UNITED PARCEL SERVICE OF AMERICA, INC.

BERNARD G. SEGAL
Counsel of Record
ROBERT L. KENDALL, JR.
JAMES D. CRAWFORD
JOHN E. MCKEEVER
Attorneys for Petitioner

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
(215) 988-2000
Of Counsel.

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-8711

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT	4
The Act and the Legislative History of the Act Support the D.C. Circuit's View of Postal Ratemaking	4
A. The D.C. Circuit Correctly Declined to Accept Either of the Conflicting Administrative Constructions of the Act	4
B. It Is Clear That, as Respondent Postal Service Now States, the Attributable Costs of Each Class of Mail Include at Least the Long-Run Variable Costs of the Class	5
C. The Act Does Not Limit Attributable Costs to Variable Costs, But Rather Requires That All Reasonable Methods of Attribution Be Pursued to Insure That Each Class of Mail Bears All of Its Attributable Costs	6
D. Unattributed Costs That Can Be Reasonably Assigned on a Cost-of-Service Basis Should Be So Assigned	11
E. Subsequent Legislative Developments Confirm the D.C. Circuit's Interpretation of the Act	15
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Association of Amer. Publ., Inc. v. Governors of the United States Postal Service, 485 F. 2d 768 (D. C. Cir. 1973) .. 4

Hi-Craft Clothing Co. v. NLRB, 660 F. 2d 910 (3d Cir. 1981) 5

National Ass'n of Greeting Card Publ. v. United States Postal Service, 569 F. 2d 570 (D. C. Cir. 1976), *consol'd case vacated as to other issues*, 434 U. S. 884 (1977) ..3, 4, 5, 9, 13, 15, 16, 17, 18

National Ass'n of Greeting Card Publ. v. United States Postal Service, 607 F. 2d 392 (D. C. Cir. 1979), *cert. denied sub nom.* Dow Jones & Co. v. United States Postal Service, 444 U. S. 1025 (1980) 3, 14

Teamsters v. Daniel, 439 U. S. 551 (1979) 5

Time, Inc. v. United States Postal Service, 685 F. 2d 760 (2d Cir. 1982) 12

Statutes:

31 U. S. C. § 1352(a) 15

Postal Reorganization Act of 1970, as amended, 39 U. S. C. § 101 *et seq.*:

§ 3621 .....12, 14

§ 3622(b) 4, 11, 13, 17

§ 3622(b)(1) 12

§ 3622(b)(2) 12

§ 3622(b)(3) .....*passim*

§ 3622(b)(4)-(9) 12

§ 3622(b)(8) 16

§ 3625 12

§ 3625(d) 12

§ 3626(a)(1) 13

Pub. L. 94-421, 90 Stat. 1303 (Sept. 24, 1976) 16

TABLE OF AUTHORITIES (Continued)

Legislative Materials:

H. R. 17070, 91st Cong., 2d Sess. (1970) 8

H. R. Rep. No. 919, 97th Cong., 2d Sess. (1982) 1, 19

Hearings on Post Office Reorganization Before the House Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1969) 8

Hearings on Postal Modernization Before the Senate Committee on Post Office and Civil Service, 91st Cong., 1st Sess. (1970) 8

S. 3842, 91st Cong., 2d Sess. (May 14, 1970) 9, 12

Statement of the Managers on the Part of the House on H. R. 17070, reprinted in 1970 U. S. Code, Cong. & Ad. News 3712 6

122 Cong. Rec. 30778 (1975) 16, 17

122 Cong. Rec. 30779 (1975) 17

122 Cong. Rec. 30781 (1975) 17

122 Cong. Rec. 30782-83 (1975) 17

122 Cong. Rec. 30784 (1975) 17

Other Authorities:

Towards Postal Excellence: The Report of the President's Commission on Postal Organization (June, 1968) 6

U. S. Department of Justice, Report, CHANGING THE PRIVATE EXPRESS LAWS: COMPETITIVE ALTERNATIVES AND THE U. S. POSTAL SERVICE (1977) 19

REPLY BRIEF OF PETITIONER UNITED PARCEL SERVICE OF AMERICA, INC.

PRELIMINARY STATEMENT

The Postal Service's statutory monopoly in first class letter mail generates 57% of total postal revenue—$13 billion annually (J. A. 45a). Proper costing is essential if revenues from this monopoly service are not to be used to price below cost those postal services that compete with private enterprise firms. Indeed, the expectation of the Department of Justice and the Department of Commerce that the Postal Service would price a competitive service below cost, which led to a recent suit against the Postal Service by the Department of Justice through the Antitrust Division (opening brief of UPS at 40 n. 19), has been confirmed by findings of the House Committee on Government Operations. In a report issued October 1, 1982, the Committee found that the Postal Service's electronic mail service that competes with private enterprise "is being subsidized by other postal services in violation of 39 U. S. C. 3622(b)(3)." H. R. Rep. No. 919, 97th Cong., 2d Sess. 2 (1982).

The present appeal squarely presents the basic question whether the cross-subsidization of competitive services of the Postal Service by revenues from monopoly first class mail will be tolerated. The D. C. Circuit, in three unanimous decisions, had held that postal rates for each class of mail must cover all of the costs that are caused by that class, and that not only variability analysis but also other reasonable inferences of causation should be used to trace costs to the individual classes. In its decision here, the Second Circuit differed sharply with the D. C. Circuit, and relied on the Statement of the Managers on the Part of the House (erroneously believed by the Second Circuit to be a report of the Conference Committee

and never even presented to the Senate) to rule that attributable costs which must be borne by each class of mail under § 3622(b)(3) of the Postal Reorganization Act are restricted to those costs that vary over the short term only.[1] 663 F. 2d at 1199-1200, 1202, ~~J. A.~~ 25a, 27a, 31a. Those respondents who disagree with the holding of the Second Circuit advocate an inadequate long-run variable costing standard that fails to capture all costs caused by individual classes of mail. The costing standards of the Second Circuit and respondents are open invitations to cross-subsidization of competitive postal services by revenues from monopoly first class mail, a result clearly contrary to the Act and congressional policy.

Although the Postal Service has now repudiated the short-run costing position it advocated from the beginning including before the Second Circuit,[2] and before this Court acknowledges that attributable costs include long-run variable costs (*see* page 5, *infra*), we briefly address that issue here because a few other parties still advocate short-run costs as the sole measure of attributable costs.[3]

---

1. A quick reading of the Second Circuit's decision might suggest that the Second Circuit would permit the Commission, as a discretionary matter, to use methods other than short-run variable costing to attribute costs. However, the Second Circuit would limit *attribution* to short-run costs, and would allow, but not require, that other costing factors be used along with the non-cost factors of the Act in the *assignment* of unattributed costs. 663 F. 2d at 1202, 31a. *See* UPS' opening brief at 17-18.

2. Postal Service brief to the Second Circuit at 12-15, 16—"[S]hort-term cost variability was the method prescribed [by Congress] for identifying the direct *and indirect* attributable costs . . . ." This earlier position of the Postal Service is described in Dow Jones' brief to this Court at 18.

3. The difference between short-run and long-run costs is significant. Short-run variable costs, as found by the Commission in this case, amount to only 50% of total postal costs, whereas long-run variable costs, as determined by the Commission, constitute more than 64% of total postal costs (J. A. 295a) (Column 6 at J. A. 294a-95a should read "Net Attributable" instead of "Not Attributable").

We also answer those respondents who argue that Congress intended that the determination of attributable costs be limited to variable costing. We show that Congress employed the non-technical term "attributable" in § 3622(b)(3) precisely because it did not want to limit attribution to any single approach or method such as variable costing, but rather chose to require the use of as many approaches as necessary to insure that all costs that are a consequence of providing service to a class of mail would be borne by the class.

Finally, we respond to arguments that would nullify the purpose and meaning of the second clause in the Act's costing provision, which requires each class to bear that part of unattributed costs that is "reasonably assignable" to the class.

However, before we discuss these issues, we must correct a serious mischaracterization of UPS' position by respondents.

In an apparent effort to divert attention from UPS' arguments, some respondents have asserted that the interpretation of the Act stated in *NAGCP-I* and reaffirmed in *NAGCP-III,* which UPS supports, inevitably leads to a "fully distributed" costing approach under which virtually all costs would be attributed and assigned on a costing basis, so that almost no costs would remain for allocation under the non-cost factors of the Act. *See, e.g.,* briefs of Postal Service at 17, 33, and Magazine Publ. Ass'n at 4-13. That simply is not so. *NAGCP-I* requires only "that each class of mail and postal service shoulder all the postal costs that may *reasonably be traced* to the provision of that class or service." 569 F. 2d at 585 (emphasis added). Under the D. C. Circuit's interpretation as applied by the Commission in this very case, approximately $6 billion—more than 25% of total postal costs—were not attributed or assigned to any class of mail on a costing basis but rather were allocated on the basis of the non-cost factors of the Act (J. A. 295a). Obviously, that is not a fully distributed costs result.

ARGUMENT

The Act and the Legislative History of the Act Support the D. C. Circuit's View of Postal Ratemaking.

A. The D. C. Circuit Correctly Declined to Accept Either of the Conflicting Administrative Constructions of the Act.

The Second Circuit's criticism of *NAGCP-I* is grounded largely on the Second Circuit's erroneous view that when *NAGCP-I* was decided, the Commission and the Postal Service were in agreement in their interpretation of § 3622(b) and therefore the D. C. Circuit should have accepted the agencies' joint interpretation. 663 F. 2d at 1193, 12a. That position is echoed by certain respondents. *See, e.g.*, briefs of Postal Service at 13 and Newsweek, *et al.* at 21. However, the fact is that when *NAGCP-I* was decided, the Commission and the Postal Service were clearly at odds over the proper interpretation of § 3622(b)(3), and the Commission itself frankly admitted that neither had gone far enough in costing postal services.

In the initial rate case (*American Publishers*), the Postal Service argued that attributable costs were limited to short-run variable costs (J. A. 297a). The Commission concluded that "[a]ttributable costs are not legally restricted to short-run variable costs" (J. A. 313a). Nevertheless, because the record did not contain any usable evidence on long-run costs and because "it would have been infeasible to halt the hearings in order to await a long-run cost study," the Commission recommended rates based on short-run costs (J. A. 301a). In the second case, the Postal Service again advocated a short-run costing approach. This time, the Commission ruled that attributable costs must include long-run variable costs (J. A. 316a-17a). Thus, there was no common position to which the D. C. Circuit could defer in *NAGCP-I*. At

the same time, the Commission insisted on precise statistical measurements of variability. Although the record contained alternatives to the Postal Service's short-run presentation (*NAGCP-I*, 569 F. 2d at 591), the Commission refused to attribute costs even though it admitted those costs were attributable because it was not satisfied that with the data available it could determine the exact level of variability (J. A. 317a).

In light of the different positions taken by the Postal Service and the Commission and the failure of both to attribute costs to the extent required by § 3622(b)(3), it would have been clear error for the D. C. Circuit to have deferred to either of them in *NAGCP-I*. *See Teamsters v. Daniel*, 439 U. S. 551, 566 n. 20 (1979); *Hi-Craft Clothing Co. v. NLRB*, 660 F. 2d 910, 914-16 (3d Cir. 1981). Instead, the D. C. Circuit took the only course open to it: it examined § 3622(b)(3) afresh and performed the judicial function of interpreting the statute.

B. It Is Clear That, as Respondent Postal Service Now States, the Attributable Costs of Each Class of Mail Include at Least the Long-Run Variable Costs of the Class.

Although the Postal Service argued to the Second Circuit in this case, as it had argued in the prior cases, that § 3622(b)(3) requires that only short-run variable costs be attributed, it now concedes that each class must cover its long-run variable costs as well. *See* Postal Service brief at 6, 20—"Petitioners UPS . . . and NAGCP . . . correctly argue that the first tier of costs [*i.e.*, attributable costs] was intended to encompass long-run, as well as short-run, variable costs . . . ." Nevertheless, a few respondents persist in arguing that Congress intended to limit attributable costs to short-run variable costs. *See* briefs of Magazine Publ. Ass'n at 29, and Dow Jones & Co. at 18. These respondents share the view taken by the Second Circuit that the language of the House Managers' Statement referring to "costs . . . that vary over the short

term in response to changes in volume" describes the cost floor adopted by the Conference Committee. *Statement of the Managers on the Part of the House on H. R. 17070*, reprinted in 1970 U. S. Code, Cong. & Ad. News 3712, 3720 ("House Managers' Statement").

Respondents seek to distinguish the cases cited by UPS in its opening brief in support of the proposition that no weight should be given to the short-term variability language of the House Managers' Statement. They assert that those cases involve situations where the unilateral statement of one house contradicted other aspects of the legislative history (*see, e.g.*, brief of Mail Order Ass'n at 26 n. 17); but that is exactly the situation here. The short-term variability language of the House Managers' Statement is in direct conflict with the legislative history, beginning with the Kappel Commission's recommendation that "each class should bear, as a minimum, the long-run variable costs ascribable to it," Kappel Report at 131, Joint App. of Legis. Hist. at 19, and ending with the Act itself.

As the Commission has long stated and as the Postal Service now recognizes, a short-run variable costs standard was neither recommended by the Kappel Commission nor adopted by Congress. The Second Circuit clearly erred in ruling that attributable costs may be limited to short-run variable costs, and its decision should be reversed.

C. The Act Does Not Limit Attributable Costs to Variable Costs, But Rather Requires That All Reasonable Methods of Attribution Be Pursued to Insure That Each Class of Mail Bears All of Its Attributable Costs.

Respondents insist that attributable costs are limited, with insignificant exceptions,[4] to variable costs. However,

4. The Postal Service's only exception to its limitation of attributable costs to variable costs is an "insignificant fraction" of

the plain language of the Act does not contain any such limitation. If Congress had intended to confine the cost floor for each class to the variable costs of the class, it could simply have said so. Instead, Congress, having considered technical costing concepts, avoided the use of technical terms in the Act—including the term variable costs—and chose the non-technical term "attributable," making it clear that each class is required to bear *all* costs that are incurred as a consequence of providing service to the class, whether those costs are variable or not.

Failing to find any language in the Act itself that limits attributable costs to variable costs, respondents attempt to invoke legislative history in order to read into the Act a restriction on attribution that is not there. The fundamental error of respondents is that they assume that the costing standard embodied in the Act is identical to the standard suggested by the Kappel Commission in its report of June 1968. However, by the time the Act was passed after more than two years of hearings, debate, and revisions to proposed bills, Congress had gone beyond the Kappel Commission's report by requiring that all reasonable methods be used to insure that each class would recover all costs incurred as a consequence of providing service to the class. Congress did not merely incorporate the Kappel Commission's recommendation into the Act without change.

It is perfectly plain that the language of § 3622(b)(3) has its roots in the Senate bill. In order to support their argument that the substance of § 3622(b)(3) comes instead from the House bill, respondents are forced to twist the language and legislative history of both versions. Thus, they argue that the Senate bill had no cost floor de-

4. (Cont'd.)

"fixed costs incurred for the benefit of a single class" of mail. Postal Service brief at 6 n. 9. These "specific fixed" costs are indeed an insignificant fraction of all costs—in this case, less than 0.4% of total postal costs (J. A. 295a).

spite the fact that the Senate bill's whole concept of costs "properly attributable" to each class contemplated a cost floor.[5]

Equally important, contrary to respondents' assertion, the House bill did not impose an effective cost floor. Although § 1201(c) of the House bill stated that the "Postal Service shall . . . establish rates and fees for each . . . class of postal service so that at least those costs demonstrably related to the class . . . will be borne by each such class," § 1201(c) was immediately limited by § 1201(d) of that bill, which provided that "Notwithstanding the other provisions of [§ 1201]" the Postal Service should take account of the financial impact of its rates on users. H. R. 17070, 91st Cong., 2d Sess. § 1201(c), (d) (1970), Joint App. of Legis. Hist. at 218, 220. *See also Hearings on Postal Modernization Before the Senate Committee on Post Office and Civil Service,* 91st Cong., 1st Sess. (1970) at 597, Joint App. of Legis. Hist. at 162; *Hearings on Post Office Reorganization Before the House Committee on Post Office and Civil Service,* 91st Cong., 1st Sess. (1969) at 507, 622, 1029-30, Joint App. of Legis. Hist. at 67, 73, 88-89.

But even if the concept of a cost floor had been derived from the House bill, the fact remains that the Conference Committee declined to adopt the standard contained in the House bill for determining the level of the cost floor. Rather, § 3622(b)(3) was derived from the Senate bill, and not from the House bill. The key phrase in the costing provision of the House bill referred to the

5. As noted by some respondents, the cost floor inherent in the Senate's costing provision apparently was not obvious to two Senators. Postal Service brief at 34-35; brief of Magazine Publ. Ass'n at 17-18. However, when the Conference Committee met, the Senate's cost floor was made more explicit by inserting additional words to make clear that its costing provision established a "requirement" that each class of mail bear its attributable costs and a reasonably assignable portion of its unattributed costs. 39 U. S. C. § 3622(b)(3).

"costs demonstrably related" to each class of mail. The House's narrowly interpreted "demonstrably related" cost standard was clearly rejected by the Conference Committee. On the other hand, the key phrases in the costing provision of the Senate bill referred to the costs "attributable" or "assignable" to each class of mail. The Act as passed contains this more encompassing standard of the costs both "attributable" and "assignable" to each class of mail. Given this identity of language, it cannot be seriously questioned that the costing provision of the Act was derived from the Senate bill and that the standard of the Senate bill determined the level of the cost floor.

Finally, it is clear that both the Senate bill and the Act's costing provision went beyond variable costs. The costing provision of the Senate bill referred not only to the "operating costs," but also to the "overhead, and other institutional costs properly attributable" or, in its final version, "properly assignable," to each class of mail. S. 3842, 91st Cong., 2d Sess. § 3703(c)(3) (May 14, 1970), Joint App. of Legis. Hist. at 256. Clearly, the costs "properly attributable" to each class of mail under the Senate bill were not limited to variable costs to the exclusion of "overhead" and "other institutional costs." When the Conference Committee adopted the "attributable" costs language of the Senate bill, it too did not limit attributable costs in any way. It specifically provided that all postal costs of whatever type, both "direct" and "indirect," are to be part of the cost floor if they are "attributable to" a class of mail. *See NAGCP-I,* 569 F. 2d at 586 n. 59.

There are significant costs that plainly are incurred because of providing service to individual classes of mail and that should therefore be attributed even though the variability of those costs cannot or has not been statistically proven. Typical of the costs that the Commission erroneously refused to attribute because it insisted on

statistical proof of variability is the cost of transporting mail between postal facilities in trucks driven by postal employees. These costs consist of $130 million of wages for truck drivers (known as vehicle service drivers) [6] and $73 million of fuel, maintenance, and leasing costs for the vehicles they drive (PRC Decision, Vol. 2, App. J at 127, R. 36:12,587-95, 36:12,622). Expert witnesses (R. 36:12, 183-85, 12,587-93) and common sense confirm that these costs are causally related to the individual classes of mail that are transported and may reasonably be allocated to those classes on the basis of weight, cubic volume, or both. Obviously, the Postal Service would not need trucks if it did not have large volumes of mail to transport. Moreover, the failure to attribute those costs is totally inconsistent with the Commission's attribution of other transportation costs resulting from the purchase of the same type of transportation service from outside trucking contractors (PRC Decision, Vol. 2, App. J at 193-217; R. 36:12,183-84, 36:12,589-91). Nevertheless, the Commission refused to attribute those described costs of motor vehicle service drivers on the ground that it lacked sufficient statistical proof of variability.

The Commission employed the same restrictive approach to attribution with respect to other types of costs, refusing, for example, to attribute $216 million of the cost of the time spent by mail carriers in deviating from their routes to make deliveries ("access time") (PRC Decision, Vol. 2, App. J at 108, 114; *see* R. 36:12,598-602).[7] Other dramatic examples of the failure of the

6. The Commission attributed only the cost of the drivers' time spent loading and unloading the vehicles, amounting to 16% of the total cost of these employees, but failed to attribute the remaining 84% of the cost of these employees ($130 million), representing their time spent driving those same vehicles in transporting the mail (PRC Decision, Vol. 2, App. J at 121-22, 127).

7. The Commission attributed only $391 million of the total of $607 million of access time cost (PRC Decision, Vol. 2, App. J. at

Commission to go beyond statistically proven variability are found in the handling of the cost of mail carriers making deliveries on business routes serving downtown business areas, where no cost whatever is attributed, and the cost of mail carriers on parcel routes, where only a limited amount of the cost of sorting and sequencing parcels on the route is attributed (PRC Decision, Vol. 2, App. J at 100, 109-11).

Unless this Court goes beyond reversing the Second Circuit's short-term cost rule and also rejects the Commission's virtually exclusive reliance on statistically provable variability, substantial amounts of costs that are plainly caused by specific classes of mail simply will not be attributed to those classes.

D. Unattributed Costs That Can Be Reasonably Assigned on a Cost-of-Service Basis Should Be So Assigned.

Some respondents seek to isolate UPS from its co-petitioner NAGCP by pointing out that NAGCP does not endorse the "three-tier" construction of § 3622(b)(3). However, NAGCP and UPS agree (1) that proper attribution under § 3622(b)(3) requires each class of mail to bear all costs that are a consequence of providing the class, as a first tier, and (2) that residual costs be allocated on the basis of the non-cost factors in § 3622(b), as a final tier. We differ with NAGCP only in our support of the D. C. Circuit's view that Congress, in placing the reasonably assignable language in § 3622(b)(3), created a middle tier of unattributed costs that are to be assigned on a costing basis rather than allocated on the basis of the non-cost factors of § 3622(b).

It is UPS' position that Congress further advanced its policy against cross subsidy of any class of mail by

7. (Cont'd.)

114), ignoring the obvious fact that every "access" is made only when there is mail to be delivered at that delivery point (R 36:12,600).

including in § 3622(b)(3) the requirement that each class bear, in addition to its attributable costs, "that portion of all other costs of the Postal Service reasonably assignable to such class." That language is part of the costing provision of the Act. There is nothing in the language of § 3622(b)(3) to suggest that the reasonable assignment clause of that section is intended to incorporate the non-cost factors of § 3622(b)(1), (2) and (4)-(9), rather than referring as it does to reasonable *costing* assignments only.

In fact, the Senate bill had always contained the list of non-cost factors eventually found in the Act. It did not contain a cross-reference in the costing clause to those clauses dealing with the non-cost factors. When the Conference Committee later added the "reasonably assignable" language to the "attributable" language in the costing clause of § 3622(b)(3), it had no more reason than the sponsors of the Senate bill had to include a superfluous reminder that the non-cost factors must be considered, since the bill already specifically stated that the Commission "shall" consider those factors. Rather, its purpose must have been to require the reasonable use of all available costing techniques after the attribution process is completed.

In opposing any requirement that some portion of unattributed costs must be assigned on a costing basis, respondents argue that the Commission is an expert ratemaking body and should be given wide discretion to arrive at proper rates. However, in the final analysis it is the Governors of the Postal Service, not the Commission, who set postal rates. 39 U. S. C. §§ 3621, 3625. *See Time, Inc. v. United States Postal Service*, 685 F. 2d 760 (2d Cir. 1982). The original Senate bill had withheld from the Governors the power to modify recommended decisions of the Commission. Compare S. 3842, 91st Cong., 2d Sess. § 3703(d)(1) (May 14, 1970), Joint App. of Legis. Hist. at 257, with 39 U. S. C. § 3625(d). Thus, it

would not be surprising for the Senate to have insisted in conference that the amount of costs not attributed or assigned and therefore subject to discretionary allocation be reduced (though not eliminated) in exchange for agreement to the provision in the House bill giving the Governors the right to adopt their own rates by modifying recommended decisions of the Commission, a power which the Governors have in fact exercised in this proceeding. *See* brief of Postal Service at 11 n. 14.

Some respondents also argue that the D. C. Circuit's interpretation of § 3622(b) is inconsistent with § 3626 (a)(1) of the Act, which provides that certain preferred classes of mail need pay only their attributable costs. *See, e.g.*, briefs of Postal Service at 19 and Mail Order Ass'n at 39. Quite to the contrary, § 3626(a)(1) supports and explains the D. C. Circuit's interpretation. As that court said:

> "It is the freedom from having to bear either these more speculative costs of service [*i.e.*, reasonably assignable costs] or a portion of the residuum costs that constitutes the 'preference' enjoyed by the classes of mail provided for in section 3626." *NAGCP-I*, 569 F. 2d at 586-87 n. 59.

Thus, there was a good reason for Congress to distinguish between the costs attributable under § 3622(b)(3) and the other costs assignable under that same subsection: to constrain the rates for the preferred classes of mail.

Both UPS and NAGCP rely primarily upon an ungrudging reading of attribution under § 3622(b)(3) to assure the fair allocation of expenses on a costing basis. There are, however, three types of expenses which UPS believes must be allocated on a costing basis if they do not meet the standards for attribution. Those expenses must be reasonably assigned under § 3622(b)(3) as middle-tier costs.

1. The first type consists of costs which by virtue of common sense and logic, one can reasonably conclude are caused by specific classes of mail but which the Postal Service, the Commission, or even the courts hold cannot or need not be attributed because the causal connection cannot be established with sufficient exactitude. While NAGCP correctly argues that these costs, examples of which have been discussed on pages 9-11 of this brief, should be attributed, it is UPS' position that if these costs are not attributed, then they must certainly be assigned on a reasonable cost-of-service basis.

2. The second type of reasonably assignable costs is the amount required to recover prior year losses, which in this case is $449 million for the test year (663 F. 2d at 1204, 35a). The provision for recovery of prior year losses reflects costs that have been incurred to provide service to the various classes of mail. As Judge Tamm said in *NAGCP-III*, "The prior years' losses in question . . . were incurred to pay for operating expenses." 607 F. 2d at 430. These expenses from previous years are difficult to fit within the rubric of attributable costs; yet they can be "reasonably assigned" to the classes that caused them. Moreover, failure to require assignment of these expenses on a costing basis is a clear invitation to the Postal Service to underprice competitive services and then to pass the resulting losses on to monopoly first class mail in succeeding years.

3. Finally, the Act provides that postal rates should include a reasonable provision for contingencies. 39 U. S. C. § 3621. The contingency amount provides insurance against overestimated revenues or underestimated costs. A substantial portion of the contingency amount represents an expense related to the providing of service for the various classes of mail. The Commission reasonably assigned, on a costing basis, $400 million of such expense to specific classes in this case (J. A. 294a-95a).

While none of these three types of expenses may easily fit as attributable costs, each plainly should be assigned to the classes to which it is reasonably related. These are the sorts of expenses which Congress intended be allocated on a costing basis, in the middle tier, when it included the "reasonably assignable" language in § 3622(b)(3).

In summary, the D. C. Circuit's three-tier interpretation is compelled by the plain language of the Act and is supported by the legislative history.[8] That interpretation should be upheld and the Second Circuit's contrary decision should be reversed.

E. Subsequent Legislative Developments Confirm the D. C. Circuit's Interpretation of the Act.

Respondents attempt to rebut UPS' argument that Congress endorsed the D. C. Circuit's *NAGCP-I* interpretation of the Act when Congress refused to adopt proposals to overrule that decision. In particular, respondents argue that the bill that would have overruled *NAGCP-I* did not pass because it was not reported out of committee in time to meet a statutory deadline imposed by the Congressional Budget and Impoundment Control Act of 1974, 31 U. S. C. § 1352(a). *See, e.g.*, Postal Service brief at 43.

However, that was in 1978. In the four years since then, Congress still has not taken any action to overrule *NAGCP-I*. As we stated in our opening brief (at 38-39), the only permissible inference that may be drawn from the failure of Congress to overrule *NAGCP-I*, given its awareness of that decision and the introduction of bills to overrule it, is that Congress sees nothing in the *NAGCP-I* interpretation calling for change.

---

8. The Commission's $1.8 billion of "service-related costs" (J. A. 294a-95a) are not properly part of the middle tier of reasonably assignable costs. Rather, a greater effort should be made to attribute these transportation and delivery costs. UPS has always opposed the "service-related costs" concept for the reasons given by NAGCP in its briefs to this Court.

Some respondents argue that an amendment to the Act that added an eighth non-cost factor[9] to the original seven non-cost factors somehow establishes that Congress wished to disavow any intent to base postal rates primarily on costing principles. *See, e.g.*, briefs of Postal Service at 43-44 and Dow Jones & Co. at 34. However, the addition of another discretionary non-cost factor for the distribution of those costs remaining after the cost factor is applied can have no effect on the interpretation of a separate mandatory costing factor, nor can it serve to enlarge the pool of costs subject to discretionary allocation. In any event, because the new factor was added to § 3622(b) before the court issued its decision in *NAGCP-I*, the addition of that factor cannot be read to undercut *NAGCP-I* in any way.

Some respondents argue that the rejection by the House of an amendment proposed in 1975 and again in 1978 by Congresswoman Schroeder shows that Congress disagrees with the *NAGCP-I* interpretation.[10] This simply does not follow for three reasons.

1. If the Schroeder amendment was merely intended to clarify § 3622(b)(3)—as Congresswoman Schroeder and

---

9. Section 10 of the Postal Reorganization Act Amendments of 1976 added to the Act the factor of "the educational, cultural, scientific, and informational value to the recipient of mail matter." 39 U. S. C. § 3622(b)(8), added by Pub. L. 94-421, § 10, 90 Stat. 1303, 1311 (Sept. 24, 1976).

10. The Schroeder amendment would have added the following italicized parenthetical phrase to § 3622(b)(3) to require each class of mail to bear the direct and indirect costs

> "attributable to that class or type (*including the costs caused by variability with volume, and all of the costs caused by the collection, transportation, processing, storing, and delivery of each class of mail or type of mail service*), plus that portion of all other postal costs reasonably assignable to such class or type." 122 Cong. Rec. 30778 (1975), Joint App. of Legis. Hist. at 368.

Congressman Rousselot asserted, 122 Cong. Rec. 30778, 30781, 30784 (1975), Joint App. of Legis. Hist. at 368, 371, 374—the rejection of that amendment, either before or after *NAGCP-I* was decided, does not undermine the *NAGCP-I* interpretation of § 3622(b)(3).

2. If the amendment would have changed existing law—as Congressman Ford believed, 122 Cong. Rec. 30782-83 (1975), Joint App. of Legis. Hist. at 372-73—then its rejection reconfirmed existing law.

3. The Schroeder language was offered as an amendment to H. R. 8603. That bill called for a study of the ratemaking provisions of the Act for the purpose of determining whether or not those provisions required revision. Immediately before the House rejected the Schroeder amendment, Congressman Hanley had urged that the House await the results of that study before tampering with § 3622(b). 122 Cong. Rec. 30779, 30784 (1975), Joint App. of Legis. Hist. at 369, 374. Thus, the House's rejection of the Schroeder amendment may indicate that the House preferred to await the results of the study called for in the bill rather than anticipate those results by prematurely amending § 3622(b).

When, after *NAGCP-I*, the Schroeder language was again offered, Congress once more made no change in § 3622(b)(3). Thus, to the extent legislative developments subsequent to the passage of the Act in 1970 shed any light on the proper interpretation of § 3622(b)(3), those developments indicate that Congress was satisfied with that section as originally passed and as interpreted by the D. C. Circuit in *NAGCP-I*.

CONCLUSION

In 1970, Congress created a postal ratemaking system premised upon the basic policy that each class of mail should bear the costs which are a consequence of providing that class. A major purpose of that legislation was fairness to both users and competitors of the Postal

Service. Rates for parcel post that do not recover as a minimum all properly attributable costs and that portion of other costs reasonably assignable to parcel post would constitute unfair competition by the Postal Service with private enterprise carriers such as United Parcel Service, which must recover all of their costs and in addition pay taxes and earn a profit (J. A. 247a). This is particularly true since the cost deficit for parcel post service would inevitably be made up from revenues received from other classes of service—almost entirely first class letter mail, where the Postal Service has a statutory monopoly.[11]

The D. C. Circuit in *NAGCP-I* correctly interpreted the intent of Congress that postal rates for competitive classes of mail must not be set below their costs. That principle must be reaffirmed here to prevent the use of revenues from monopoly letter mail—the second largest monopoly in the United States—to cross-subsidize classes of mail facing actual or potential competition.

Because of their concern over the inadequate costing practices of the Postal Service and the procedure of utilizing excess revenues of monopoly first class mail to subsidize postal services in which the Postal Service competes with the private sector, the present Department of Commerce and the present Department of Justice through its Antitrust Division intervened before the Commission. Those Government departments sought to assure that

---

11. The Postal Service states (brief at 33 n. 30) that when one takes into account the increase in parcel post rates in 1970 before the Act was passed, the total increase in parcel post rates "would have been significantly closer to the Consumer Price Index increase of 135%." Even including the 1970 pre-Act increase of 15% in parcel post rates, the total increase in parcel post rates is still less than the 135% increase in the CPI, and materially less than the 233% increase in first class mail rates since the Act was passed (J. A. 250a). The present rates for parcel post would be even lower if on three occasions including this proceeding the Commission had not raised the rates requested by the Postal Service.

rates for the Postal Service's new competitive electronic computer-originated mail service (E-COM) would not be subsidized by first class mail users.[12] *See* opening brief of UPS at 40 n. 19. Their intervention was ultimately frustrated on a technical procedural ground by virtue of which the Commission was deprived of the opportunity to recommend rates that would comply with the Act. Thereafter, as the Antitrust Division had predicted, the Postal Service inaugurated E-COM at rates that did not cover its costs. After hearings, the Committee on Government Operations of the House of Representatives expressly found:

> ". . . that the current E-COM rate is not compensatory; that the Postal Service has known for some time now that this is so; and, therefore, that E-COM is being subsidized by other postal services in violation of 39 U. S. C. 3622(b)(3)."

H. R. Rep. No. 919, 97th Cong., 2d Sess. 2 (1982).

United Parcel Service does not object to the keenest legitimate competition by the Postal Service when that competition is based upon proper cost attribution and assignment as required by the Postal Reorganization Act. However, neither UPS nor other enterprises in the private sector can compete with the Postal Service if it is permitted to establish for any competitive service, including parcel post, rates which recover less than all costs fairly and reasonably allocable to that service, as the deficient costing standard advocated by the Postal Service would allow. Clearly that standard, as well as the totally inadequate short-term standard endorsed by the Second Circuit, must be rejected.

---

12. A previous Department of Justice concluded that first class mail rates set under the Act subsidized users of other classes. U. S. Department of Justice, Report, CHANGING THE PRIVATE EXPRESS LAWS: COMPETITIVE ALTERNATIVES AND THE U. S. POSTAL SERVICE 29 (1977).

Respectfully submitted,

BERNARD G. SEGAL
Counsel of Record
ROBERT L. KENDALL, JR.
JAMES D. CRAWFORD
JOHN E. MCKEEVER
Attorneys for Petitioner

SCHNADER, HARRISON, SEGAL & LEWIS
1719 Packard Building
Philadelphia, Pennsylvania 19102
(215) 988-2000
Of Counsel.

Dated: November 18, 1982.

Intervenor's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304, 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

REPLY BRIEF FOR INTERVENOR DIRECT MAIL/MARKETING ASSOCIATION, INC.

DANA T. ACKERLY
Counsel of Record
CHARLES LISTER
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000
Attorneys for Direct Mail/ Marketing Association, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

Page

I. TIER-ONE COSTS ARE NOT LIMITED TO VOLUME-VARIABLE COSTS. 5

II. ONLY CAUSALLY-RELATED COSTS MAY BE DIRECTLY ALLOCATED TO THE CLASSES. 12

III. CAUSALLY-RELATED COSTS MAY NOT BE JUDGMENTALLY DISTRIBUTED AMONG THE CLASSES. 13

TABLE OF AUTHORITIES

CASES: Page

Ass'n of American Publishers, Inc. v. *United States Postal Serv.*, 485 F.2d 768 (D.C. Cir. 1973) 4

National Ass'n of Greeting Card Publishers v. *United States Postal Serv.*, 569 F.2d 570 (D.C. Cir. 1976) *vacated as to other issues*, 434 U.S. 884 (1977) 1, 3, 4

National Ass'n of Greeting Card Publishers v. *United States Postal Serv.*, 607 F.2d 392 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) 1

Newsweek, Inc. v. *United States Postal Serv.*, 663 F.2d 1186 (2d Cir. 1981), *cert. granted*, 72 L. Ed. 2d 439 (1982) 2, 4, 13

Time, Inc. v. *United States Postal Serv.*, 685 F.2d 760 (2d Cir. 1982) 2

STATUTES:

39 U.S.C. § 3622(b)(2) 13

LEGISLATIVE MATERIALS:

Bills:

H.R. 11750, 91st Cong., 1st Sess. (1969) 9

Debates:

116 Cong. Rec. 26954 (1970) 6

116 Cong. Rec. 27605 (1970) 7

116 Cong. Rec. 27606 (1970) 6

Table of Authorities Continued

Page

Hearings:

Post Office Reorganization: Hearings Before The Committee on Post Office and Civil Service, House of Representatives, 91st Cong., 1st Sess. (1969) 6

ADMINISTRATIVE DECISIONS:

PRC Dkt. No. R80-1, Opinion and Recommended Decision (Feb. 19, 1981) 3, 7, 9

PRC Dkt. No. R80-1, Opinion and Recommended Decision Upon Reconsideration (June 4, 1981) 12

MISCELLANEOUS:

Rates and Rate-making: A Report to the President's Commission on Postal Organization, Annex II to the Kappel Report (1968) 8, 11

Towards Postal Excellence: The Report of the President's Commission on Postal Organization (1968) 4, 6, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 81-1304, 81-1381

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

---

REPLY BRIEF FOR INTERVENOR DIRECT MAIL/MARKETING ASSOCIATION, INC.

There is little dispute that Congress gave the Postal Rate Commission significant discretionary authority to resolve postal costing and pricing issues.[1] At issue in this

---

[1] This discretionary authority was given to the Commission, not the Postal Service. National Ass'n of Greeting Card Publishers v. United States Postal Serv., 569 F.2d 570, 576, 592-93 (D.C. Cir. 1976), *vacated as to other issues*, 434 U.S. 884 (1977) ("*NAGCP I*"); National Ass'n of Greeting Card Publishers v. United States Postal

(footnote continues)

case is the precise definition of the legal parameters within which this discretion must be exercised. For this purpose, it is not useful to analyze the Act in terms of number of "tiers."[2] As a practical matter, every postal cost is treated in one of two ways: (1) direct "allocation" through accounting-type distribution keys, or (2) judgmental "distribution," measured by relative cost coverages. The question at bar is: which costs should be directly allocated and which costs should be judgmentally distributed.

Specifically, this case presents three principal issues of statutory construction:

1. Did Congress intend to limit the analytical methodologies by which causal relationships between groups of postal costs and particular classes of mail were to be identified?

2. Did Congress intend to permit direct allocation of costs on a basis other than cost causality?

3. Did Congress intend to permit judgmental distribution of any causally-related cost?

Each of these issues should be resolved in the negative.

Petitioners argue that the Commission is required to allocate among the classes certain costs in addition to those that are "clearly identifiable"[3] as being caused by

---

(footnote continued)

Serv., 607 F.2d 392, 401, 404 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) ("*NAGCP III* "); Newsweek, Inc. v. United States Postal Serv., 663 F.2d 1186, 1190 (2d Cir. 1981), *cert. granted*, 72 L. Ed. 2d 439 (1982) ("*Newsweek*"); Time, Inc. v. United States Postal Serv., 685 F.2d 760, 774 (2d Cir. 1982) ("*Time*"). The *Newsweek* court held that the Postal Service had discretionary authority in a limited area, *i.e.*, the timing of rate increases. 663 F.2d at 1204.

[2] *See* DMMA Br. 11.

[3] *See* USPS Br. 29 n.23.

particular classes of mail.[4] By contrast, respondents argue that only volume-variable costs[5] may be directly allocated among the classes.[6] According to respondents, the Commission has discretion to distribute judgmentally all other costs, including costs for which causal responsibility can be determined by modes of analysis other than volume variability.

Neither view accurately reflects congressional intent. Respondents give the Commission too much pricing discretion; petitioners give the Commission too little. Congress did not intend to impose any specific cost accounting system (based on volume variability or otherwise) on the "independent," "expert," "professional" Postal Rate Commission.[7] Congress did intend that, as a prerequisite

---

[4] UPS Br. 36-38; NAGCP Br. 28-31; *See NAGCP I*, 569 F.2d at 586-87.

[5] Unless otherwise indicated, the term "volume" will be used herein in the sense of "units of output that can be used as distribution keys, such as pieces or pounds of mail." *See* PRC Dkt. No. R80-1, Opinion and Recommended Decision (Feb. 19, 1981) (the "First RD") 123. This apparently is the sense in which the term is used by the Postal Service. *See, e.g.*, USPS Br. 20-21.

The proper definition of "volume," however, is not without controversy and uncertainty. *See* First RD 123-28. For example, if the Postal Service were to decide to give first-class treatment to one billion third-class pieces, mail volume (in terms of the number of pieces) will not have varied, but the Postal Service will have increased its "output" in a very real sense: it will have provided a higher level of service to those one billion pieces of mail. If the Postal Service incurred additional expenses to provide this higher level of service, would these expenses be causally related to a variation in USPS "output?"

[6] According to the Postal Service, costs included in the rate floor must meet *two* criteria: "caused by the class in question" *and* "varied with the volume of mail." USPS Br. 28.

[7] *See* DMMA Br. 12-13 & nn.19, 20.

to the establishment of "fair and equitable" rates, each class of mail should bear *all* the costs that can be identified as being caused by that class.[8]

The Commission was given authority to determine when a particular costing methodology identifies a causal relationship with sufficient certainty to warrant treatment of a group of costs as "tier one" costs. The Commission's discretion with regard to causally-related costs extends to approval of *any* costing methodology; it is not limited to methodologies based on volume variability. The Commission was also given authority judgmentally to distribute the remaining, "tier two" costs in accordance with the non-cost, "pricing" factors of Section 3622(b).

The Commission's discretion is not as broad, however, as the Second Circuit has suggested. Having once identified a causal relationship between costs and particular classes, the Commission does not have the discretion to treat such costs as tier-two costs.[9] By the same token, as the D.C. Circuit held, the costing process should be carried out to the maximum extent possible.[10] Congress

---

[8] *See, e.g.*, DMMA Br. 14-15.

[9] *Contra Newsweek*, 663 F.2d at 1202. Foremost among the various congressional goals was the avoidance of cross-subsidization between classes. Only by having each class pay all the costs for which it was responsible could the problems of the past be overcome and mailers be assured that they were paying non-discriminatory rates. *See, e.g.*, *Towards Postal Excellence:* The Report of the President's Commission on Postal Organization (1968) ("Kappel Report") 131 (DMMA App. 7a-8a); DMMA Br. 18. The judgmental distribution of causally-related costs would fly squarely in the face of this congressional goal.

[10] Ass'n of American Publishers, Inc. v. United States Postal Serv., 485 F.2d 768, 779 (D.C. Cir. 1973) (Bazelon, C.J., concurring); *see also NAGCP I*, 569 F.2d at 584. The avoidance of cross-subsidization cannot be achieved unless the applicable costing methodologies accurately measure *all* the costs for which each class is responsible.

intended that each class should bear all the costs that it causes. As a result, the Commission does not have discretion to ignore new costing methodologies; on the contrary, the Commission has a continuing obligation to seek to improve and refine the methods by which it determines cost responsibility.

The Postal Service occupies a crucial position in this process. Regardless of the desires of the Commission further to improve and refine the identification and measurement of cost responsibilities, there is very little that the Commission can do if the Postal Service refuses to conduct the studies and accumulate the data necessary to the application of new or refined methodologies. If this Court determines, as DMMA believes it should, that Congress did not intend attributable costs to be limited to volume-variable costs, it should make clear the duty of the Postal Service, as well as the Commission, to continue the refinement of postal costing techniques to the end that postal rates reflect actual cost responsibility to the maximum extent feasible.

I. Tier-One Costs Are Not Limited To Volume-Variable Costs.

The Postal Service's position in this case rests on the dubious proposition that Congress formed a specific, conscious intention of a very technical character, *i.e.*, to limit the rate floor to those costs that vary with "volume." USPS Br. 20-44. This position should be rejected, because (1) congressional intent was general, not technical, in nature, and (2) the USPS position conflicts with the only technical analysis with which Congress was familiar.

It is difficult to impute to Congress any sophisticated intent concerning the technical character of the rate floor.

The non-technical phrasing of Section 3622(b)(3);[11] the general, non-discriminatory purpose behind the rate floor;[12] the infancy of postal attributable-cost accounting techniques;[13] the great variety of terminology used during the legislative process;[14] and the non-technical language used by key individuals to describe the rate floor[15]—all these factors make more reasonable the conclusion that Congress intended to establish a broad, general policy and leave its implementation to the Commission.[16]

---

[11] *See* DMMA Br. 16-18.

[12] *See* Kappel Report 131 (". . . to avoid undue discrimination every class of service should, as a minimum, pay for all of those costs which it alone causes.") (DMMA App. 7a-8a); *see also* USPS Br. 28 n.22, quoting Kappel Report 148.

The desire to avoid discriminatory rates was applicable to "each class of mail, be it for the ordinary citizen or for the big commercial mailer," 116 Cong. Rec. 27606 (Aug. 6, 1970) (remarks of Congressman Udall) (Jt. Leg. App. 365), not merely to first-class mail. *See* UPS Br. 19.

[13] *See* DMMA Br. 22-23; USPS Br. 40 n.36 ("The Act itself was wisely drawn to accommodate . . . future developments." The House Statements were intended to "explain what extent of attribution Congress expected would be immediately undertaken."). A provision drawn to accommodate future developments could not contain a precise, and therefore inflexible and restrictive, technical definition.

[14] *E.g.*, "marginal costs," "incremental costs," "assignable costs," "attributable costs," "demonstrably related costs," and "variable costs." *See generally* USPS Br. 20; DMMA Br. 19-26.

[15] *See, e.g.*, 116 Cong. Rec. 26954 (Aug. 3, 1970) (remarks of Sen. McGee) (Jt. Leg. App. 358) ("actual postal costs").

[16] As postal management stated in the early legislative stages, the rate-making provisions of the legislation were not intended to "shackl[e] future generations to any particular economic theory." Post Office Reorganization: Hearings Before the Committee on Post

(footnote continues)

Even if Congress did intend to legislate a technically precise standard, there is no reliable evidence that the rate floor was intended to be limited to costs that vary with "volume."

The USPS brief is obscure on this central issue. On one hand, the brief apparently uses "volume" in the narrow sense of units of physical output.[17] On the other hand, the brief acknowledges that, as used throughout the legislative history, the term "volume-variable" referred to a rather complex cost accounting concept. The term was stated to include "indirect" variation[18] as well as variation over a "long" period, the precise length of which "admits of no precise answer."[19] The term was also stated to

---

(footnote continued)

Office and Civil Service, House of Representatives, 91st Cong., 1st Sess. 1273 (1969) (Jt. Leg. App. 91). And as Congressman Udall stated concerning the conference report, "From the very beginning, there was widespread agreement between House and Senate conferees that Congress should lay down broad policy guidelines and that we leave the application of those policies to full-time professional rate commissioners." 116 Cong. Rec. 27605 (1970) (remarks of Cong. Udall) (Jt. Leg. App. 364).

[17] The brief asserts that the "rate floor was to be set by the attribution of marginal costs, . . . [which] were to be costs that varied with the volume of mail." USPS Br. 27-28. Concerning other possible definitions of volume, *see* First RD 123-128; discussion p. 3, n.5 *supra*.

[18] It should be noted that DMMA did not argue that ". . . because Congress included costs that vary indirectly with volume, it also intended to require attribution of costs that do not vary with volume." USPS Br. 41 n.36. DMMA argued that the House Statements are not technically precise, because "indirect" costs are "lumpy" costs that do not vary with volume over the "short term." *See* DMMA Br. 28 n.63.

[19] USPS Br. 30 n.27.

include variability in "capital,"[20] "capacity,"[21] and "peak-load"[22] costs.

It is of particular significance that the Postal Service's position conflicts with the recommendations of the Kappel Commission, upon which Congress relied so heavily.[23] The Postal Service ignores the fact that the "marginal cost" concept, described in the Foster Associates Study and adopted by the Kappel Commission,[24] included costs beyond those that varied with volume. It specifically included costs that varied with *capacity*.[25]

To review the chronology briefly, the Foster Associates Study had concluded that the "lower boundary to a reasonable class rate" should be "marginal costs," which would include costs that "vary not only in terms of identifiable units of output, but also in terms of service capacity required to make possible that output."[26] The Kappel

---

[20] USPS Br. 22.

[21] USPS Br. 26.

[22] USPS Br. 46.

[23] *See* USPS Br. 13 ("The reports of the Kappel Commission and Foster Associates . . . laid the conceptual foundation for the Act. . . .").

[24] *See* USPS Br. 23 (the Foster Associates Study "provides a more detailed basis for the conclusions reached by the [Kappel] Commission").

[25] In common parlance "capacity costs" are the antithesis of "volume-variable costs." *See* USPS Br. 26-27 n.21. As the Foster Associates Study stated:

> "Our concept of marginal cost differs from the usual engineering or accounting definition which focuses on costs which vary in relation to output. We use a multi-dimensional concept of variability of cost." *Rates and Ratemaking:* A Report to the President's Commission on Postal Organization, Annex II to the Kappel Report (1968) ("Foster Associates Study") 1-5.

[26] Foster Associates Study 3-33 (DMMA App. 7b). *See also id.* 5-18—5-21. Curiously, the USPS brief specifically admits this critical point. *See* USPS Br. pp. 29-30 n.25 ("long-run marginal cost" as

(footnote continues)

Commission adopted the conclusions of the Foster Associates Study,[27] specifically mentioning as types of "variable" costs those that are not normally associated with "volume," such as "capital" and "peak load" costs.[28]

The legislative bills and reports in the House of Representatives, whence the "rate floor" provision originated,[29] borrowed a term—"demonstrably related" costs—from the Kappel Report.[30] This was a non-technical term that had, nevertheless, been given a relatively precise definition in the first attempt to develop a proper USPS cost accounting system.[31] This term was rejected in favor of a new phrase, "direct and indirect attributable" costs, during the final drafting of the legislation.[32]

The explanations of this phrase contained in the House Statements[33] are unreliable as expressions of the intent of

---

(footnote continued)
defined by the Foster Associates Study was to take into account "capacity additions.").

[27] *See* DMMA Br. 19-22; USPS Br. 21-26.

[28] *E.g.*, Kappel Report 31, 131 (DMMA App. 2a, 8a). More recently, the PRC has come to a similar conclusion. The Commission has recognized that cost causality could be identified on the basis of variability with "volume" or any other "mail characteristic." First RD 123-138. Similarly, the Commission was careful to specify that it would use the term "fixed" to mean "fixed with respect to volume" and not necessarily "fixed with respect to any other mail characteristic." First RD 138.

[29] *E.g.*, USPS Br. 36-37.

[30] Kappel Report 131 (DMMA App. 8a).

[31] The conclusion that the House utilized the term "demonstrably related" costs in a non-technical sense is supported by its use in the initial legislative proposal introduced in 1969. H.R. 11750, 91st Cong., 1st Sess. § 1201(c) (1969). The term was not given a technical meaning until the development of the Revenue and Cost Analysis Report the next year. *See* DMMA Br. 22-23.

[32] *See* UPS Br. 29-30.

[33] *See* DMMA Br. 28 n.62.

Congress as a whole[34] and, more importantly, do not even support the USPS position. They do not limit attributable costs to volume-variable costs[35] and are inconsistent with the USPS position in at least one other critical respect.[36]

The briefs of the Postal Service and several respondents contain a few additional citations to "volume-variable" costs. Close analysis, however, reveals that these statements do not support the propositions for which they are cited. The statements cited in the March of Dimes brief, for example, actually refer to the then-new RCA Report and not to a proposed statutory standard, or were apparently intended as a shorthand explanation to educate an unsophisticated audience, not to define a legal standard.[37]

---

[34] *See* DMMA Br. 26-33.

[35] The Statements include among attributable costs those that "even though fixed rather than variable, are the consequence of providing the specific service involved." *See* DMMA Br. 28. The Statements do not limit these "specific fixed" costs to costs that benefit only one class of mail. Indeed, in Docket No. R80-1, the Postal Service directly allocated the fixed costs of certain facilities that benefited two classes, Special Delivery and Express Mail. *See* DMMA Br. 33 n.70. Moreover, in its brief the Postal Service argues that the allocation of specific fixed costs to more than one class "should be settled . . . in agency proceedings," implying that such allocation is permissible under the Act. USPS Br. 47 n.45.

[36] The Statements limit attributable costs to short-run variable costs, inconsistent with positions taken by the Postal Service in recent rate proceedings. The Postal Service's position concerning the reference to "short-run" costs has gone through a remarkable evolution. *See* UPS Br. 32 n.14. The Postal Service now disavows the authoritative character of the reference to "short-run." USPS Br. 20, 40 n.36. Under the circumstances, the Postal Service cannot reasonably claim that *any* portion of the Statements is authoritative.

[37] *See* MOD Br. 20-22 and authorities cited therein.

The weakness in the Postal Service's position is evident from its attempt to distinguish peak-load costs (which form part of the rate floor)[38] from service-related costs (which, according to the Postal Service, do not).[39] The Postal Service's treatment of this issue is technically inaccurate. Peak-load costs are the costs of providing capacity sufficient to meet service standards, given the timing patterns of volume.[40] Contrary to the Postal Service's assertion, peak-load costs, *qua* peak-load costs, are not "volume-variable" costs.[41] It does not necessarily follow that "the larger the volume of mail, the larger the peak."[42]

The impact on peak costs of a larger number of mail pieces depends on the *timing* of that extra volume. For example, more first-class mail collected at 5:00 p.m. would increase peak costs, because it would have to be processed promptly, during the peak evening hours. More first-class mail collected at 9:00 a.m. would not increase peak costs, because it could be processed during the relatively slack mid-day shift.

The impact on peak costs of a larger number of mail pieces also depends upon the applicable *service standard*. For example, more mail received at 5:00 p.m. might or might not increase peak-load costs, depending on whether it was first-class mail (and had to be processed

---

[38] USPS Br. 46.

[39] USPS Br. 46-47.

[40] *See, e.g.*, Foster Associates Study 3-34—3-35 (DMMA App. 8b-9b).

[41] Also contrary to the USPS assertion, DMMA never argued that peak-load costs are "variable" costs. *See* USPS Br. 46. DMMA did point out that the Foster Associates Study treated peak-load costs as one aspect of marginal costs. DMMA Br. 20-21.

[42] *See* USPS Br. 46.

that evening) or BRR mail (and could be deferred until a slack time the next day).

Service-related costs are similar to peak-load costs in all respects here relevant. They are the costs of providing capacity sufficient to meet the "six-day-delivery" service standard required by preferential mail as opposed to a hypothetical "three-day-delivery" service standard that would be adequate for non-preferential mail.[43]

Neither peak-load costs nor service-related costs are volume-variable; they vary with some other "mail characteristic," as the Commission has defined the term.[44]

For all of the above reasons, if Congress is held to have incorporated some technical definition of the rate floor into Section 3622(b)(3), it is much more reasonable to conclude that Congress intended to follow the recommendation of the Foster Associates Study, which was the only generally accepted, technical definition of a rate floor extant in August 1970.

II. Only Causally-Related Costs May Be Directly Allocated To The Classes.

Petitioners' briefs only confirm the lack of merit in the "three-tier" interpretation of Section 3622(b). Petitioners base their arguments almost wholly upon the semantic ambiguity of the statutory language; they are unable to point to any portion of the legislative history where Congress considered a three-step approach to rate-making.[45] Moreover, petitioners fail to explain why Congress would have mandated an "assignment" process similar to that

---

[43] *See generally* PRC Dkt. No. R80-1, Opinion and Recommended Decision Upon Reconsideration (June 4, 1981) 67-115; DMMA Br. 36-40.

[44] First RD 127-28.

[45] *See, e.g.*, UPS Br. 36-38.

used in the thoroughly discredited Cost Ascertainment System without a very explicit expression of intent.

Under these circumstances, the "two-tier" approach is the only reasonable interpretation of Section 3622(b). If certain costs do not meet the criteria of "direct and indirect attributable costs," they must be judgmentally distributed along with all the other "institutional" costs in accordance with the pricing factors.

III. Causally-Related Costs May Not Be Judgmentally Distributed Among The Classes.

If tier-one costs include all causally-related costs, it follows that causally-related costs may not be judgmentally distributed in the tier-two pricing process. Accordingly, the resolution of this[46] and other issues concerning the status of service-related costs ("SRC") follows readily from the definition of tier-one costs.

No party has argued that Congress "directed" the attribution of SRC.[47]

DMMA has argued that SRC are causally-related costs; therefore, they are tier-one costs and may not be judgmentally distributed in the tier-two pricing process. DMMA would agree that, if the PRC could not identify a causal relationship between SRC and particular classes, SRC could not be treated as tier-one costs, but should merely be taken into account in the judgmental distribution of tier-two costs.[48]

The Postal Service agrees that tier-one costs may not be judgmentally distributed,[49] but takes the position that

---

[46] *See Newsweek*, 663 F.2d at 1202; DMMA Br. 10-11.

[47] *See* USPS Br. 44.

[48] *See* 39 U.S.C. § 3622(b)(2); USPS Br. 46.

[49] USPS Br. 18.

SRC are not tier-one costs, because tier-one costs are limited to costs that vary with "volume."

Aside from the definition of tier-one costs, there is no dispute here. Given the Commission's characterization of SRC as causally-related costs, the proper treatment of SRC follows from a decision as to whether tier-one costs contain all causally-related costs or only those that vary with "volume."

Respectfully submitted,

DANA T. ACKERLY
Counsel of Record

CHARLES LISTER

COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Direct Mail/ Marketing Association, Inc.

November 1982

Amicus Brief

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1304 and 81-1381

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,
v.
UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,
v.
UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

ARTHUR B. SACKLER
Counsel of Record
NATIONAL NEWSPAPER ASSOCIATION
Suite 400
1627 K Street, N.W.
Washington, D.C. 20006
(202) 466-7200
Attorney for National Newspaper Association

W. TERRY MAGUIRE
Counsel of Record
PAMELA RILEY
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500
Attorneys for American Newspaper Publishers Association

September 7, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1304

NATIONAL ASSOCIATION OF GREETING CARD PUBLISHERS,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

No. 81-1381

UNITED PARCEL SERVICE OF AMERICA, INC.,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Newspaper Publishers Association ("ANPA") and National Newspaper Association ("NNA") hereby move for leave to file the accompanying Brief *amici curiae*. As grounds for their Motion, ANPA and NNA state that:

1. They requested consents of each of the parties in accordance with this Court's Rule 36.

2. Consents were received from 14 of the 17 parties to these cases.

3. On September 7, 1982, after the accompanying Brief had been printed, counsel for three respondents represented by the same law firm, although not consenting to the filing of this Brief, stated that they would not oppose this Motion.

4. As more fully set forth in the Brief (at 2-3) the interest of ANPA and NNA in these cases is that these associations represent thousands of newspapers throughout the United States or North America which mail large numbers of newspapers at second-class mail rates. The members of these associations also are concerned about, and make substantial use of, other classes of mail. Because the resolution of these cases may determine the rates which ANPA's and NNA's members pay to mail their newspapers, each association has a substantial interest in the outcome of these cases. As the Brief more fully sets forth, the historic policy of this Nation to permit the economical dissemination of newspapers and other publications of importance to the public, which may not be addressed by other parties, may be at stake in these cases. It is for this reason that ANPA and NNA seek leave of the Court to file the accompanying Brief.

5. The undersigned counsel was not aware that not all parties would consent to the filing of the accompanying Brief, and no refusals had been received until September 7, 1982, the date for filing of the Brief. The Brief, as printed, states that consent of counsel for each of the parties had been received and filed with the Court, whereas, as noted herein, there is a lack of consent by Reader's Digest Association, Inc., Mail Order Association of America and Parcel Shippers Association. Copies of the consents of 14 of the 17 parties have been received and are being filed with the Court.

CONCLUSION

For the foregoing reasons, the motion for leave to file brief of *amici curiae* the American Newspaper Publishers Association and the National Newspaper Association should be granted.

Respectfully submitted,

ARTHUR B. SACKLER
Counsel of Record
NATIONAL NEWSPAPER ASSOCIATION
Suite 400
1627 K Street, N.W.
Washington, D.C. 20006
(202) 466-7200
Attorney for National Newspaper Association

W. TERRY MAGUIRE
Counsel of Record
PAMELA RILEY
AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
Box 17407
Dulles International Airport
Washington, D.C. 20041
(703) 620-9500
Attorneys for American Newspaper Publishers Association

September 7, 1982

Docket Sheet

NO. 81-1304-CFX Vide: 81-1381 81-1868	TITLE National Association of Greeting Card Publishers, Petitioner v. United States Postal Service, et al.

DOCKETED	COURT
Jan. 12, 1982	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Matthew S. Perlman
	Counsel for Respondents: Solicitor General, Robert A. Saltzstein, Raymond N. Shibley, Bernard G. Segal, William J. Olson, John M. Burzio, Alan R. Swendiman. (Over)
Jan. 12, 1982	Petition for writ of certiorari filed. (Record filed).
Jan. 12, 1982	Appendix filed.
Feb. 3, 1982	Order extending time to file a response to the petition until Feb. 24, 1982.
Feb. 5, 1982	Order extending time for respondent Dow Jones & Co., Inc. to file a response to the petition until Feb. 24, 1982.
Feb. 11, 1982	Order extending time for the Government to file a response to the petition until March 13, 1982.
Feb. 17, 1982	Order extending time for respondent Direct Mail/Marketing Association, Inc., to file a response to the petitio until March 13, 1982.
March 9, 1982	Order further extending time for the Government to file a response to the petition until March 27, 1982.
March 23, 1982	Joint memorandum of respondents Dow Jones & Company, Inc., and Newsweek, Inc. in support of petition filed. (Vide: 81-1381).
March 26, 1982	Brief of respondent Direct Mail/Marketing Association, Inc. in opposition filed. (Vide: 81-1381).
March 26, 1982	Brief of respondent United States Postal Service in support of petition filed. (Vide: 81-1381).
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 19, 1982	Petition GRANTED. The case is consolidated with 81-1381 and a total of one hour is allotted for oral argument.

Apr. 29, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until July 2, 1982.
June 29, 1982	Order extending time to file the respondents' brief on the merits until Aug. 23, 1982.
July 2, 1982	Brief of petitioner National Association of Greeting Card Publishers filed. (Vide: 81-1381).
July 2, 1982	Joint appendix filed. (Vide: 81-1381)
July 2, 1982	Brief for intervenor Direct Mail/Marketing Association, Inc. filed. (Vide: 81-1381).
	(Over)

81-1304

Title

No.

DATE	PROCEEDINGS AND ORDERS
	Counsel for respondents cont'd: Toni K. Allen, Eli Davidson Minton, Dana T. Ackerly, Michael F. McBride David C. Todd, Ian D. Volner
July 8, 1982	Brief of petitioner United Parcel Service of America, Inc. filed. (Vide: 81-1381).
* Aug. 18, 1982	Order further extending time to file the government's brief on the merits until Sept. 7, 1982.
Sept. 7, 1982	Brief for the United States Postal Service filed .(Vide: 81-1381)
Sept. 7, 1982	Brief for respondent Magazine Publishers Association, Inc., filed. (Vide: 81-1381)
Sept. 7, 1982	Brief for intervenor-respondents March of Dimes Birth Defects Foundation, et al. filed. (Vide: 81-1381)
Sept. 7, 1982	Brief of respondent Dow Jones & Company, Inc. filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondent American Business Press filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondents Newsweek Inc. and Time Incorporated filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondents Recording Industry Association of America, et al. filed. (Vide: 81-1381).
Sept. 7, 1982	Brief of respondents Mail Order Association of America, et al. filed. (Vide: 81-1381).
Sept. 7, 1982	Motion of American Newspaper Publishers Association and National Newspaper Association for leave to file brief as amici curiae filed. (Vide: 81-1381).
Sept. 15, 1982	CIRCULATED.
Sept. 20, 1982	Motion of Direct Mail/Marketing Association, Inc. for leave to participate in oral argument filed.
*July 15, 1982	Motion of petitioners for divided argument and for additional time for oral argument filed. (Also in 82-1381
Sept. 24, 1982	Opposition of Solicitor General to motion of Direct Mail/Marketing Association, Inc. for divided argument filed (Also in 81-1381).
Sept. 24, 1982	Opposition of petitioners to motion of Direct Mail/ Marketing Association, Inc. for divided argument filed. (Also in 81-1381).
Oct. 4, 1982	The motion of petitioner for divided argument is GRANTED. The request for additional time for oral argument is DENIED. The motion of American Newspaper Publishers Association, et al. for leave to file a brief as amici curiae is GRANTED. The motion of Direct Mail/Marketing Association, Inc. for leave for divided argument is DENIED.

(Card No. 2)

NO. 81-1304-CFX (Vide: 81-1381)	TITLE National Association of Greeting Card Publishers, Petitioner v. United States Postal Service, et al.

DOCKETED	COURT
Jan. 12, 1982	United States Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
Nov. 18, 1982	Reply brief of petitioner United Parcel Service of America, Inc. filed. (Vide: 81-1381). (D).
Nov. 19, 1982	Reply brief of petitioner National Association of Greeting Card Publishers filed. (Vide: 81-1381). (D).
Nov. 24, 1982	Reply brief for intervenor Direct Mail/Marketing Association, Inc. filed. (D). (Vide: 81-1381).
Dec. 1, 1982	ARGUED.